Calendar No. 79

100TH CONGRESS *1st Session*	SENATE	REPORT 100-34

FAIRNESS IN BROADCASTING ACT OF 1987

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 742

APRIL 3 (legislative day, MARCH 30), 1987.—Ordered to be printed

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Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

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[To accompany S. 742]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 742) to clarify the congressional intent concerning, and to codify, certain requirements of the Communications Act of 1934 that ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance, having considered the same, reports favorably thereon withour amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of the bill (S. 742) is to amend the Communications Act of 1934 to clarify the congressional intent concerning and to codify expressly certain requirements of the Communications Act of 1934 to ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

LEGISLATIVE HISTORY

S. 742 was introduced on March 12, 1987 by Senator Hollings, with Senators Inouye and Danforth as co-sponsors. It amends section 315 (a) of the Communications Act of 1934 (47 U.S.C. 315(a)) to require expressly that broadcast licensees present discussion of con-

flicting views on issues of public importance, commonly known as the Fairness Doctrine. This doctrine can currently be found in the regulations of the Federal Communications Commission, 47 C.F.R. 73.1910. A hearing was held on this legislation on March 18, 1987, and eight witnesses testified.

In addition to S. 742, two other bills concerning the Fairness Doctrine have been introduced in the Senate in the 100th Congress. Both seek to repeal the Fairness Doctrine. S. 22, the First Amendment Clarification Act of 1987, was introduced on January 5, 1987 by Senator Proxmire. The purpose of this legislation is to delete the Fairness Doctrine and other similar requirements from the Communications Act. The same bill has been introduced by Senator Proxmire every Congress since 1975. The Committee has taken no action on S. 22 or any of its predecessors.

On March 24, 1987, Senator Packwood introduced S. 827, the Freedom of Expression Act of 1987, legislation to repeal section 315 and section 312(a)(7) of the Communications Act. This legislation is similar to legislation introduced by Senator Packwood in the 98th Congress (S. 1917) and in the 99th Congress (S. 1038). Hearings were held on Senator Packwood's proposals on September 28, 30, and November 19, 1982 and on January 30, February 1 and 8, 1984. An amended version of S. 1917 was considered and rejected by the Commerce Committee in executive session on June 13, 1984 by a vote of 11–6. No action was taken on S. 1038.

Background and Needs

The Fairness Doctrine, adopted in 1949 by the Federal Communications Commission ("The Commission"), requires broadcasters to (1) cover issues of public importance, and (2) fairly reflect differing viewpoints on those issues. The Fairness Doctrine does not require that broadcasters provide every side of an issue with the exact amount of time in precisely the same time period. Instead, broadcasters simply must ensure that their programming taken as a whole presents issues of public importance and does so in a balanced fashion.

In October, 1981, the FCC recommended to Congress that the Fairness Doctrine be repealed. FCC News Release Report No. 5068, September 17, 1981. Almost three years later, the Commission instituted a proceeding to examine the rationale for the doctrine and its effects. Notice of Inquiry, 49 Fed. Reg. 20317 (May 14, 1984). The resulting Report concluded that the doctrine should be repealed because it did not significantly further free speech and it chilled the speech of broadcasters. 102 FCC 2d 145 (1985). The Commission, however, continued to believe that there were strong arguments that the Congress had codified the Fairness Doctrine in 1959 and, consequently, did not repeal it. The Commission continued to express to Congress that it believed the Congress had to make the decision to repeal the doctrine. A petition to review the Report was immediately filed in the U.S. Court of Appeals by the Radio-Television News Directors Association. *Radio-Television News Directors Association* v. *FCC,* No. 85–1691, Slip op. (D.C. Circuit January 16, 1987).

During the pendency of this appeal, the Congress reviewed the Report. It determined that the Commission's inquiry was deficient and directed the Commission to report, by the end of fiscal year 1987, whether there are alternative means of administering and enforcing the doctrine which would lessen the cost and increase the benefits. Public Law No. 99-500 (October 18, 1986). In the report accompanying this legislation, Congress also expressed its support for the Fairness Doctrine and its belief that the Fairness Doctrine should not be repealed.

In September, 1986, the U.S. Court of Appeals, in holding that the Fairness Doctrine does not apply to the teletext service, also held that the doctrine was not a statutory requirement. *Telecommunications Research and Action Center* v. *FCC,* 80 F. 2d 501 (D.C. Cir. 1986) (TRAC). The court concluded that Congress merely ratified the doctrine in making its 1959 amendments to section 315(a) of the Communications Act and that the doctrine stems from the general public interest standard in the Act. This issue is now before the U.S. Supreme Court on a petition for certiorari of the *TRAC* decision. It should be noted that the Committee believes the Court of Appeals decision wrongly interpreted the 1959 amendments and that the Congress did explicitly place the Fairness Doctrine in the Communications Act at this time. While the Committee urges the U.S. Supreme Court to reverse the lower court's holding it cannot risk a contrary result. That is why it is essential that this legislation proceed.

While the Congressionally mandated study is pending, the Commission has instituted a proceeding (Order, FCC No. 87-33 released January 23, 1987) to eliminate the Fairness Doctrine, asserting that its action is mandated by the U.S. Court of Appeals, District of Columbia decision in *Meredith Corporation* v. *FCC,* No. 85-1723, Slip, op. D.C. Circuit January 16, 1987. However, the *Meredith* decision was not final at the time the Commission began this proceeding. On March 31, 1987, the court denied the request for rehearing.

The Commission did not begin the study required by Congress until February 19, 1986, four months after the law was signed. MM Docket No. 87-26. In contrast to the one-month comment period in Docket No. 87-33, the Commission here will accept comments over three months.

During the past five and one-half years, the Commission has consistently sought to abolish the Fairness Doctrine, despite continuously voiced Congressional support for the doctrine. Because the Commission's efforts to repeal the Fairness Doctrine are so close to fruition, the Committee is compelled to codify the doctrine and make it an explicit requirement of the Communications Act. Arguments that the Congress should await the Commission's completion of the study mandated by statute are not cogent, since this study addresses a much different issue: the Fairness Doctrine as administered and enforced. This study does not address whether there should be alternatives to the doctrine itself.

From the enactment of the Federal Radio Act in 1927, the premise underlying regulation of broadcasters has been as follows: because of scarcity of a valuable public resource, the electromagnetic spectrum, the limited number of broadcasters have special obligations and should operate as public trustees. Since few could

own and operate broadcast stations relative to demand for such stations, there was a need to ensure that others could speak on important public issues and the the public would receive a wide variety of views on these matters. The Fairness Doctrine is a specific application of the public trustee concept that enhances speech and furthers first amendment principles.

It is not claimed by the Commission in its Report that the original reasons for the Fairness Doctrine no longer exist and that, in any event, the doctrine never enhanced speech of the public. In addition, it is argued that: (1) there are significantly more radio and television stations today than in 1949; (2) the spectrum is no longer scarce because of technological developments and new services; and (3) the doctrine has actually inhibited speech since broadcasters often refrain from airing certain programs or advertisements because they would then have to permit others to respond.

The Committee has considered the Commission's 1985 Report on the Fairness Doctrine. As discussed in its Report, the Committee finds that the Commission's conclusions in its Report are factually flawed, are based on erroneous legal analysis, and are entitled to no deference. The Committee believes a close examination of the realities of the broadcasting service clearly demonstrates that the original premises for the Fairness Doctrine remain: (1) a valuable public resource, the electromagnetic spectrum, remains scarce relative to demand; broadcast channels are limited, despite the introduction of new video and audio services; (2) Congress in the Communications Act has chosen a system where a select few are licensed to utilize the broadcast spectrum in exchange for a commitment to operate in the public interest as public trustees; (3) the doctrine has permitted those who do not own broadcast stations to have an opportunity to participate in important public debate, and has provided the public with a greater range of views upon which to make informed decisions; and (4) the doctrine is not more than good journalistic practice that does not chill the speech of broadcasters.

THE FAIRNESS DOCTRINE

The Fairness Doctrine requires broadcast licensees to afford reasonable opportunities for the discussion of conflicting views on issues of public importance. In effect, the doctrine has two prongs: it requires broadcasters to cover issues of public importance and to present issues fairly. This does not mean that when a licensee presents one side of a controversial issue, the licensee is required to provide a forum for opposing views on that same program or series of programs. The licensee is only expected to make a provision for the opposing views in the licensee's overall programming. "Further there is no requirement that any precisely equal balance of views be achieved, and that all matters concerning the particular opposing views be present and the appropriate spokesman and format for their presentation are left to the licensee's discretion subject only to a standard of reasonableness and good faith." Fairness Report, 48 FCC 2d 1, 18 (1974) ("1974 Fairness Report").

In determining whether there has been a violation of the Fairness Doctrine, the Commission does not monitor broadcasts. The

Commission only acts if it (1) receives a complaint and (2) determines that the complaint presents prima facie evidence of a violation. Moreover, in order for the Commission even to consider a complaint, it must have the following information:

(1) the particular station involved;

(2) the particular issue of a controversial nature that was discussed over the air;

(3) the date and time when the program was carried;

(4) the basis for the claim that the station has presented only one side of the question; and

(5) whether the station has afforded, or plans to afford, an opportunity for the presentation of contrasting viewpoints.

Fairness Doctrine Primer, 40 FCC 598, 600 (1964). Under this standard, it is not enough for a complainant to assert that the complainant viewed a program which presented only one side of the issue. The complainant must also demonstrate that in its other programming the station has not presented contrasting views on the issue. This does not mean that the complainant must listen to or view the station twenty-four hours a day, seven days a week, only that the complainant demonstrate that it has viewed or listened to the evening news and a significant portion of the public affairs programming. 1974 Fairness Report, 48 FCC 2d at 19.

In responding to a complaint forwarded by the Commission, "the station is not required to research everything it broadcast on the subject over a considerable period of time." 48 FCC at 20. If the complaint specifies a single program, then it would be sufficient for the licensee to show that it broadcast another program "which did afford a reasonable opportunity for contrasting views." *Id.* The Fairness Doctrine does not require "exact equality in time provided" for contrasting viewpoints, only that "a reasonable opportunity be afforded to their presentation." 48 FCC 2d at 20.

To put this information into perspective, it is helpful to consider the following statistics. In fiscal year 1974, the Commission received 2,400 Fairness Doctrine complaints, and only 94 of those complaints were forwarded to the licensee for their comments. *See* 1974 Fairness Report, 48 FCC 2d at 8. In recent years, although the number of complaints has grown, the number of inquiries to licensees has dropped.

Year	Complaints filed	Complaints forwarded to licensee
1984	6,760	Approximately 6.
1985	7,296	Do.
1986	5,509	Do.

See Letter to Senator Inouye from Chairman Mark Fowler, March 20, 1987.

During the six years that Mark Fowler has been Chairman of the Commission, only on Fairness Doctrine complaint has resulted in litigation. (See *Meredith Corp.* v. *FCC, Supra.*) In reality, there are very few instances where Fairness Doctrine complaints result in any action by the Commission or the courts. Of the witnesses who testified on March 18, 1986 who presently own or are em-

ployed by broadcast stations, none has ever been asked by the Commission to respond to a complaint.

Seventeen years ago, the Supreme Court unanimously upheld the Fairness Doctine against first amendment challenge in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). The Court held that in the context of broadcasting, the rights of the viewing public to hear contrasting viewpoints on issues of public importance, not the rights of broadcasters, were paramount, and that the Fairness Doctrine was both a permissible and effective means of vindicating those rights. The fact that far more people were willing and able to engage in broadcasting than could possibly be accommodated by the limited spectrum available justified a regulatory scheme that required those granted licenses to serve as fiduciaries or trustees and obligated them to present the views of those who are excluded from the airways. The factual predicate of scarcity—a greater number of individuals wishing to broadcast than available frequencies—remains present today, and *Red Lion's* conclusion that the Fairness Doctrine is constitutional thus remains valid. In addition, the Fairness Doctrine is a reasonable condition on the use of a valuable public resource, the spectrum. These conclusions are reinforced by an examination of the history of the Fairness Doctrine and an analysis of how the doctrine functions in practice. This examination further reveals that the doctrine serves to increase speech on issues of public importance.

HISTORY

Red Lion was not the beginning of the principle that broadcasters, who receive a valuable public resource for free, are required as a consequence to act as public trustees and to present diverse viewpoints on important issues. The concept was and is at the core of the public interest standard of the Communications Act.

The early experience with radio showed that with unfettered competition for use of the airwaves, no one could effectively broadcast. Instead, all were drowned out. The Navy reported to the United States Senate that: [C]alls of distress from vessels imperiled on the sea go unheeded or are drowed out in the etheric bedlam produced by numerous stations all trying to compete at once. . . . It is not putting the case too strongly to state that the situation is intolerable, and is continually growing worse. S. Rept. No. 659, 61st Cong. 2d sess. at 4 (1910). *See also* E. Krasnow, L. Longley, and O. Terry, The Politics of Broadcast Regulation 10–16 (3d. Ed. 1982). As a result, the broadcasting industry demanded government allocation of the spectrum. Herbert Hoover commented in 1924 that he thought broadcasting was "probably the only industry of the United States that is unanimously in favor of having itself regulated." Quoted in G. Head, Broadcasting in America: A Survey of Television and Radio 126 (3d. 1976). In response to this request, Congress provided for federal regulation of broadcasting and required that licenses be granted on the basis of the "public interest".[1]

[1] The requirement that broadcasters by regulated in the "public interest, convenience and necessity" was included in the original statute affecting broadcasting, the Radio Act of 1927. Herbert Hoover, in 1924, argued that broadcasters should be public trustees:

Continued

In one of the first actions under the public interest standard, the Federal Radio Commission (FRC), predecessor of the Commission, held that the right to free expression did not extend to the broadcast of private issues. In the matter of WRAK in Erie, Pennsylvania, the station's owner and another licensee were engaged in personal controversy, using their broadcast facilities for abusive exchanges, against each other. The FRC stated that it "is not attempting to pass on the responsibility for a dispute * * *. The Commission, however, is certain that whoever may be to blame, it is not in the public interest, convenience or necessity to permit these two broadcasters further to regale the inhabitants of Erie with their personal differences". 1927 FRC Annual Report, p. 159.

Later in 1928, the FRC expanded on its prohibition against the use of stations for private purposes in the matter of WCOT. There the FRC prohibited the use of a station "chiefly for the purpose of serving the private interests of the applicant and as a conveyance for his personal views." Although no mention is made of presenting opposing views, it was implicit in the decision that this was not done and that lack of balance "invoked the Commission's ire." Id. at 152.

Later that same year, the FRC articulated what was clearly, the infant Fairness Doctrine. Id. at 154. the FRC stated that in broadcasting political or religious themes, a station "must be conducted with due regard for the opinions of others".

Clearly these cases, WRAK, WCOT and WEVD, are the root of the FRC's "Principles Underlying the Evaluation of Broadcast Stations" which were first announced in *Great Lakes Broadcasting Co.* 3 FRC Ann. Re. 32, 34 (1929), rev'd on other grounds, 37 F. 2d 993 (D.C. Cir.), cert. Dismissed, 281 U.S. 706 (1930):

> Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interest of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this. * * * In such a scheme there is no room for the operation of broadcasting stations exclusively by, or in the private interests of, individuals or groups so far as the nature of the program is concerned. * * * Insofar as a program consists of discussion of public questions, public interest requires amply play for the free and fair competition of opposing views and the Commission believes that the principle applies * * * to all discussions of issues of importance to the public.

The phrase "due regard for the opinion of others" from WEVD evolved in *Great Lakes* to an affirmative responsibility strikingly similar in language to the present day "fairness doctrine".

"Radio Communications is not to be considered as merely a business carried on for private gain, for private advertisement, or for entertainment of the curious. It is a public concern impressed with the public trust and is to be considered primarily from the standpoint of public interest to the same extent and upon the basis of the same general principles as our other public utilities." Hearings on H.R. 7357 Before the House Committee on Merchant Marine and Fisheries, 68th Congress, 1st Session, 10 (1924).

Thus followed a spate of license revocations for what essentially were fairness and personal use violations. Among those revocations were the notorious Brinkley and Shuler cases.

Dr. John R. Brinkley, operator of KFBK, used his broadcast facility as an integral part of two other ventures, his Brinkley Hospital and Brinkley Pharmaceutical Association. For three 30-minute broadcast periods each day, the doctor appeared personally over the station. During those programs, he would read letters mailed by listeners describing their various physical ailments and, without any personal examination, prescribe remedies for those ailments. Those remedies invariably entailed prescription of Dr. Brinkley's special concoctions, designated by number and available at participating pharmacies. In turn, member druggists remitted a fixed percentage of their gross sales of Brinkley tonics to KFBK in lieu of a fixed charge for the doctor's broadcast time. By far the greatest volume of the station's annual income was derived from those royalties and advertisements for Brinkley Hospital.

Due to the number of complaints the broadcasts generated, the station's application for license renewal was set for hearing. The FRC determined that renewal of the license was not in the public interest, convenience or necessity. It found that the practice of prescribing medical treatment over the air without physical examination was inimical to the public interest and that Dr. Brinkley had operated the station for his own private purposes. Dr. Brinkley appealed the FRC's ruling to the U.S. Court of Appeals for the District of Columbia. *KFBK Broadcasting Association, Inc.* v. *FRC,* 47 F. 670 (D.C. Cir. 1931).

In upholding the FRC's action, the court determined that the business of broadcasting, as a species of interstate commerce, is subject to reasonable regulation by Congress and its arm, the FRC. The court then reasoned:

> When Congress provided that the question whether the license should be issued or renewed should be dependent upon a finding of public interest, convenience or necessity, it very evidently has in mind that broadcasting should not be a mere adjunct of a particular business, but should be of a public character. Obviously there is no room in the broadcast band for every business or school of thought. Id. at 672.

For the first time, the Court of Appeals agreed that a broadcast license could not be used for a private purpose.

The Shuler case involved the renewal of KGEF's license. Trinity Methodist Church was the nominal licensee. However, KGEF was actually operated and controlled by Robert P. Shuler, the church's pastor. He was the principal spokesman over the station, frequently taking positions on controversial issues of a public nature and launching personal attacks upon public officials, the courts, and other individuals and groups. He often severely criticized the Catholic Church and disparaged Jews. Moreover, his allegations and disparagements had no basis in fact, and frequently were meritless.

After a hearing, the FRC decided not to renew the license, and stated:

> The Commission holds no brief for any parties subjected to attacks through the medium of station KGEF, but in almost every instance appearing on the record the attacks made by Shuler, and the methods employed thereof, are certainly not in the interests of the public or the rendition of a commendable broadcasting service. The broadcasts of this party are filled with misstatements of fact and insinuations based thereon . . . Surely, the case, in such a manner, of one of the most powerful mediums of furnishing instruction and entertainment to the public does not meet the statutory standard upon which the right to hold a license must be based. *While the Commission does not have the power of censorship, it does have the duty of determining whether the standard fixed by law has been or will be met by the use of a broadcast license.* (Emphasis supplied.) *Trinity Methodist Church, South* v. *FRC*, 62 F. 850 (D.C. Cir.) cert. denied, 284 U.S. 685 (1932).

Thus, in addressing broadcasts that involved personal attacks and in concluding that such attacks were not in the public interest, the FRC developed a new standard for dealing with broadcast content. It condemned broadcasts "filled with misstatements of fact and insinuations based thereon." The broadcast of opinion per se was not condemned, only opinion based upon misstatement of fact.

The U.S. Court of Appeals for the District of Columbia, upholding the FRC's action, said:

> If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptibilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the Nation a theater for the display of individual passions and the collisions of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the first amendment, or an impairment of their free exercise. Appellant may continue to indulge his structures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of commerce for those purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe. Id.

In 1938, the Commission reached another level in its development of the Fairness Doctrine. The Commission denied the applica-

tion of Young Peoples Association for the Propagation of the Gospel for a construction permit. Because of an association policy not to permit the use of its facilities by persons or organizations whose views differed from those of the applicant. *Young Peoples Association for the Propagation of the Gospel,* 6 FCC 178 (1938). The Commission reasoned:

> The facilities of the station are to be used primarily for the dissemination of religious programs to advance the fundamentalist interpretation of the Bible. The applicant stated, however, that in connection with religious broadcasts the station's facilities would be extended only to those whose tenets and beliefs in the interpretation of the Bible conincide with those of the applicant . . . Where the facilities of a station are devoted primarily to one purpose and the station serves as a mouthpiece for a definite group or organization, it cannot be said to be serving the general public. That being the case, if one group or organization is entitled to a station facility for the dissemination of its principles, then other associations of equal magnitude would be entitled to station licenses on the same grounds. *Id.* at 181.

The applicant's refusal to broadcast various points of view is the singular reason given for denying the permit. Obviously, the "fairness doctrine" in at least skeletal form was very much alive in 1938 as before.

In 1941, the Commission issued its so-called *Mayflower* decision. *Mayflower Broadcasting, Corp.,* 8 FCC 333 (1940). The Yankee Network, Inc. was licensee of two broadcast outlets located in Boston, Massachusetts, stations WAAB and WNAC. Starting early in 1937, both stations adopted a policy of broadcasting licensee editorials. Through that vehicle, station management advocated election of various political candidates and took positions upon a number of controversial public issues.

On March 31, 1938, one Lawrence J. Flynn, a former employee of the Yankee Network, Inc., forwarded a petition to the Commission requesting a hearing upon the renewal application of WAAB. He based his criticism of the station upon the editorial practices of management. Supporting his argument, he accompanied his petition with recordings of editorials and political speeches allegedly delivered by an employee of the licensee over both stations WAAB and WNAC. Flynn later withdrew his petition and the evidence upon which is was based.

On March 23, 1939, Mayflower Broadcasting Corp. filed application for construction of a new broadcasting station in Boston and requested for it the frequency being used by WAAB. One of the three shareholders of Mayflower was Lawrence J. Flynn. The Mayflower application and the WAAB renewal application were designated for hearing. On January 17, 1941, the final order of the Commission was issued with the following phrase: "In brief, the broadcaster cannot be an advocate." *Id.* at 340.

In the proposed findings and conclusions, Mayflower's application for a construction permit was denied. However, in renewing

WAAB's license, the Commission also addressed the matter of editorial practices. The Commission said:

> No attempt will be made there to analyze in detail the large number of broadcasts devoted to editorials. The material in the record has been carefully considered and compels the conclusion that this licensee, during the period in question, has revealed a serious misconception of its duties and functions under the law. Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that the limitations on the frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends. Radio can only serve as an instrument of democracy when devoted to the communication and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidates of his friends. It cannot be devoted to the support of principals he happens to regard most favorably. In brief, the broadcaster cannot be an advocate. Id.

Whatever the positions that were argued, the decision was widely interpreted as a flat prohibition against licensee editorializing of any sort. This interpretation prevailed until 1949.

Mayflower did not abolish the public interest requirement that broadcasters carry controversial public issues in their other broadcast content. In *Mayflower,* the Commission stated:

> Freedom of speech must be broad enough to provide full and equal opportunity for the presentation of all sides of public issues * * * fairly objectively and without bias.

The basis for the conclusion that the Commission forbade licensee editorials is the Commission's statement that:

> Relying upon these comprehensive and unequivocal representations [not to editorialize] and in view of the loss of service to the public involved in the deletion of the station, it has been determined to grant the application for renewal.

Within a year, the Commission, apparently realizing the difficulties with its position, relented from the hard implications of *Mayflower.* In its 1941 Seventh Annual Report at page 28, the Commission stated that:

> The public interest—not the private interest—is paramount * * *. Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of an issue.

Noticeably absent from the report was any mention of the prohibition against editorializing. In fact, the Commission intentionally deleted the language restricting licensees' editorials when quoting language from the *Mayflower* decision. After that report and prior

to 1949, the Commission addressed licensees' "fairness" obligations in a number of contexts. See *WHKC,* 10 FCC 515 (1945) (the public interest is not served where a station intentionally excludes certain issues of public importance); *Public Service Responsibilities of Broadcast Licensees* (1945) (appraising licensees of the renewal procedures and their programming obligations); *United Broadcasting Co.,* 10 FCC 515 (1945) (stations cannot as a general policy refuse to sell time for the discussion of controversial issues).

In its *Editorializing Report of 1949,* 13 FCC 1246 (1949) the Commission released its most comprehensive discussion of licensee "fairness" obligations. The Commission collected and summarized its previous "fairness" decisions with the noticeable exception of *Mayflower.*

> [T]he individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that the licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear differing positions on the public issues of interest and importance in the community * * *. For the licensee is a trustee impressed with the duty of preserving for the public generally radio as a medium of free expression and fair presentation. Id. at 1256.

Thus the foundation of the modern "fairness doctrine" was laid.

In interpreting the 1949 Report, in 1950, the Commission stated that "the licensee has an affirmative duty to seek out, aid and encourage the broadcast of opposing viewpoints." *WLIB* 6 RR 258 (1950). However, in the matter of KNOE, the words "seek out" were deleted. See FCC Letter to KNOE Mimeo 76175.

In 1959, Congress amended section 315 of the Communications Act to add the proviso that broadcasters are not relieved "from the obligation imposed upon them under this Act to operate in the public interest and to offer reasonable opportunity for the discussion of conflicting views on issues of public importance." 47 U.S.C. 315(a). In reporting the legislation that was later to include this provision, the Senate Committee took great care to indicate its intent that the Fairness Doctrine should remain in effect: "In recommending this legislation, the committee does not diminish or affect in any way Federal Communications Commission policy or existing law which holds that a licensee's statutory obligation to serve the public interest is to include the broad encompassing duty of providing a fair cross section of public affairs and matters of public controversy." S. Rept. 526, 86th Cong., 1st Sess. p. 13 (1959). To ensure this occurred, the full Senate added the Fairness Doctrine language as an amendment. The Conference Committee of the House and Senate described this amendment as "a restatement

of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communications Act of 1934." H.R. Rept. No. 1069, 86th Cong., 1st Sess. (1959). (For a more detailed history of the development of the Fairness Doctrine, See Appendix 1.)

THE RATIONALE FOR S. 742

The government's oversight of the broadcast industry and the establishment of the Fairness Doctrine rest on four fundamental conclusions:

(1) A valuable public resource, the electromagnetic spectrum, remains scarce relative to demand; broadcast channels are limited, despite the introduction of new video and audio services;

(2) Congress in the Communications Act has chosen a system where a select few are licensed to utilize the broadcast spectrum in exchange for a commitment to operate in the public interest as public trustees;

(3) The doctrine has permitted those who do not own broadcast stations to have an opportunity to participate in important public debate, and has provided the public with a greater range of views upon which to make informed decisions; and

(4) The doctrine is no more than good journalistic practice that does not chill the speech of broadcasters.

The American system of broadcasting is unique. In the 1920's and 1930's for radio and in the 1940's and 1950's for television, the Commission, with the approval of Congress, developed a system of broadcasting that depended generally on a limited number of full power stations. Congress could just as easily have mandated alternative uses of the broadcast spectrum to produce a greater number of broadcast stations, akin, for example, to cellular radio, although at far less power. Congress could have also decided that this spectrum could be used for a video programming service provided by common carriers under tariff. Under such a scheme, the licensee would have had no control over content. It is also possible that Congress could have required sharing of these frequencies, as is often done in the private radio field. Finally, Congress could have severely restricted or prohibited renewal of licenses or the ownership of licenses. In each of these theoretical examples, there would have been the opportunities for a far greater number of people to broadcast, albeit with the likelihood of a much smaller audience. Instead, it was concluded that the public interest would be best served by fewer stations with greater power each under the control of a single owner. While the opportunity for members of the public to air their views was thereby limited, broadcasters were required by statute to act as trustees for all the public in exchange for the valuable privilege conferred *gratis* by the grant of a broadcast license. As part of this obligation to serve the public, broadcasters must adhere to the Fairness Doctrine. The doctrine serves as a surrogate for other methods of licensing that would have permitted more people to own stations. In effect, it permits non-owners to become temporary licensees and the public to receive additional views. By codifying the Fairness Doctrine, the Committee intends to preserve this original allocation of rights and responsibilities.

It is indisputable that the government needs to control the electromagnetic spectrum. In the early days of broadcasting when there was no such control, people established stations with little or no regard to their effect on other operators. The result was chaos. It was clear that government oversight was essential to prevent interference and permit the operators and the public to have a clear signal.

The government's oversight of the spectrum not only extends to preventing interference within a service but to allocating spectrum to prevent interference among services. In making these spectrum judgments, the government faces an extraordinarily difficult task. The prime spectrum was the first occupied and is now the most crowded. There are virtually no open bands in the first 1000 MHz of the spectrum, even though many users still want access.

In parcelling out this prime territory, the government's aim has been to ensure that each service was in the best interests of the public. Broadcasting, telephones, safety and rescue services, and business uses have taken precedence. In each instance, the government has established rules for the use of the spectrum concommitant with the type of service offered: public trustee rules for broadcasters; obligations to service all at tariffed rates for common carriers. Where the government permitted the spectrum to be licensed to many people and where each license served only a limited number of people, the government generally eased its requirements that a licensee serve as a fiduciary for the public at large.

To have a better grasp of this oversight of the spectrum, one should look at the example raised at the March 18th hearing by Senator Packwood. The Senator asked whether the Fairness Doctrine should be applied to a newspaper transmitted for publishing via satellite, since the transmission involves use of the spectrum. While this transmission involves spectrum, it is spectrum operated by a common carrier that must permit anyone to have access to it at tariffed rates. The sending of the newspaper is comparable to any telephone conversation, where there are few restrictions on the speaker's message and where the licensee has no control of the message's content. It should also be noted that the newspaper being transmitted goes from one point to about ten specifically designated locations; it is not sent unfettered to the general public. This transmission, in addition, takes little time, freeing the same spectrum for many other users.

There are two other considerations that need to be accounted for in adopting regulations for the use of spectrum in the public interest. First, the regulation must be effective. It should accomplish the purpose for which it was designed. If not, it should be amended or replaced. Second, the regulation should be narrowly tailored so as to impose the minimal burden on the licensee. While this poses problems in a nationwide scheme of spectrum regulation, the government still has a duty to fashion its regulations in conformity with this objective.

The underpinnings for government control of the spectrum are firm. Its ruling have been upheld time and time again by the courts. They have proven to be of great use to the public. The question now arises whether the premises for the broadcast rules remain. It is argued that the frequencies used by broadcasters are

not longer scarce, that there are many opportunities to became broadcasters and that there is sufficient competition to broadcasters to further open public choice. The opponents of S. 742 also claim that the Fairmess Doctrine does not work and that it chills the speech of broadcasters. For the reasons that follow, the Committee finds these arguments are not supported by evidence and concludes that the rationale for the Fairness Doctrine remains sound.

1. The constitutional rational for the fairness doctrine

The Supreme Court's acceptance of public interest regulation of broadcasters dates back to the early 1930's. In *FRC* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266 (1933), the Court upheld the authority of the Federal Radio Commission to reallocate frequencies among communities, even where this involved taking a license away from a party already broadcasting. In *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134 (1940), the Court noted that the public interest standard effected Congressional desires to "maintain a grip on the dynamic aspects of radio transmission" and to reduce fears that in the "absence of governmental control, the public interest might be subordinated to monopolistic domination of the broadcast field." *Id.* at 137–138. In *National Broadcasting Co.* v., *United States,* 319 U.S. 190 (1943), the Court for the first time heard the argument that public interest regulation of broadcasting violated the first amendment. The court concluded, in rejecting this position, that because government must choose among licensees, denial of a license on a basis "comprehended within the statutory criterion of "public interest" was not a denial of free speech. *Id.* at 226–27.

That the "scarcity" of the broadcasting frequencies allows imposition of public interest obligations upon broadcasters was also first recognized in *National Broadcasting Co.* This scarcity is not based simply on the number of electronic outlets, but on the number of those who seek broadcast frequencies compared to the number of frequencies available. Thus, in *NBC,* Justice Frankfurter observed that:

> Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. *Id.* at 226.

An obvious implication of the *NBC* court's holding that licenses may be denied on the basis of public interest criteria is the recognition that broadcast licensees may, under the first amendment, be affirmatively required to serve the public interest generally rather then simply seeking private gain.

Perhaps the clearest judicial articulation of the principle occurred twenty years ago in *Office of Communication of United Church of Christ* v. *FCC,* 359 F.2d 994 (D.C. Cir. 1966). In the course of ordering the Commission to conduct a hearing sought by representatives of the listening public to examine charges of racial and

religious discrimination and Fairness Doctrine violations by a licensee, the court, speaking through Judge Burger, said:

> A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligations imposed by law. A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty. 359 F. 2d at 1003.

Three years later, when the case was again before the Court of Appeals, Judge Burger once more recognized the role of broadcasters as fiduciaries:

> [B]y whatever name of classification, broadcasts are temporary permittees—fiduciaries—of a great public resource and they must meet the highest standards which are embraced in the public interest concept. The Fairness Doctrine plays a very large role in assuring the public resource granted to licensees at no cost will be used in the public interest. *Office of Communication of United Church of Christ* v. *FCC,* 425 F.2d 543, 548 (D.C. Cir. 1969).

The Fairness Doctrine was unanimously upheld in *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969). The Court surveyed fifty years of broadcasting history, including twenty years of experience with the Fairness Doctrine, and found the doctrine constitutional. The Court observed that

> [O]nly a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had. 395 U.S. at 388.

Thus, "where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish." Id. at 388. Instead, the public interest standard applicable to broadcasters makes paramount the rights of viewers:

> [b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio, and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. Id. at 390.

This paramount interest of the public, as well as the interest of those speakers denied broadcast frequencies, rendered constitution-

al a decision to treat broadcasters as "prox[ies] or fiduciar[ies]" for the community at large as well as for those who "would otherwise, by necessity, be barred from the airwaves." Id.

It is noteworthy that in *Red Lion* broadcasters argued, much as critics of the Fairness Doctrine argue today, that technological developments since the *National Broadcasting Co.* decision had reduced the scarcity of broadcast facilities to the point where the challenged rules were no longer a permissible attempt to further other first amendment values and increase opportunities for speech. In responding to these contentions, the Court did not emphasize, and indeed barely even discussed, the absolute number of broadcast facilities in particular markets. Instead, it observed that "comparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past." Id. at 398. The Court thus indicated that it was mainly concerned with scarcity relative to demand, not some shortage of outlets. The Court made this clear by noting that "nothing in this record or in our own research convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated * * *". Id. at 399. The Committee believes this conclusion remains correct. Demand for broadcast frequencies still exceeds supply, and governmental licensing and regulation is necessary to resolve competing claims to these frequencies.

The initial involvement of government in the selection of broadcast licensees limits the relevance of one of the overriding concerns of first amendment jurisprudence: the necessity of preserving the full independence of the press and individual speakers from government oversight. For example, in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), the Supreme Court held that a statute which provided for a right to respond to newspaper attacks upon candidates for public office was unconstitutional. In striking down the statute, the Court emphasized the "governmental coercion" involved in enforcing such a right of reply, Id. at 255, as well as the level of governmental interference in the operation of the press that such a right would entail.

In his concurring opinion, Justice White adverted to the "virtually insurmountable barrier between government and the print media insofar as government tampering in advance of publication with news and editorial content is concerned." Id. at 259. Such concerns are obviously of limited relevance in the context of broadcasting. The rigid wall separating government and the printed press does not exist, since the Commission must, of necessity, select among competing applicants for available broadcast frequencies, and ensure that licensees abide by rules governing the use of these frequencies. The government's affirmative involvement in broadcasting presents the opportunity for government to fashion regulatory regimes creatively in order to vindicate a range of first amendment interests left unprotected by a strict separation between government and the system of freedom of expression.

Since *Red Lion*, the Supreme Court has consistently reaffirmed the scarcity and public trustee rationales, while upholding regulation of broadcasters against first amendment attack. Four years after *Red Lion*, in *Columbia Broadcasting System Inc.* v. *DNC*, 412

U.S. 94 (1973), the Court reiterated the scarcity rationale for broadcast regulation:

> The broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcast is subject to an inherent physical limitation. Broadcasting frequencies are a scarce resource; they must be portioned out among applicants. Id. at 101.

Recognizing that the Fairness Doctrine was sufficient to ensure that journalistic discretion by a licensee was exercised in the public interest, the Court observed that:

> It was reasonable for Congress to conclude that the public interest in being informed required periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priority should be concentrated in the licensee rather than diffused among many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. Id. at 125.

In *FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978), the Court upheld Commission regulations prohibiting cross-ownership of newspapers and broadcast stations against first amendment challenge. While conceding that the regulations were "designed to further the first amendment goal of achieving diversity of information", both broadcasters and newspapers argued that the rules violated the first amendment rights of newspaper owners. Id. at 799. In response, the court observed that:

> [T]he physical limitations of the broadcast spectrum are well known. Because of problems of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public. In light of this physical scarcity, government allocation and regulation of broadcast frequencies are essential as we have often recognized. . . . We see nothing in the first amendment to prevent the Commission from allocating licenses so as to promote the "public interest" in diversification of the mass communications media. Id.

That this still represents the view of the Supreme Court is confirmed by its 1981 opinion in *CBS, Inc.* v. *FCC.,* 453 U.S. 367 (1981). While *NCCB* emphasized the scarcity rationale in upholding broadcast regulations, *CBS, Inc.* v. *FCC* unequivocally reaffirmed that broadcasters must still be considered public trustees whose licenses are conditioned upon continued service in the public interest. In *CBS,* the Court upheld a limited right of access of federal candidates to broadcasting facilities established in section 312(a)(7) of the Communications Act of 1934 (47 U.S.C. 312(a)(7)). In rejecting the broadcasters first amendment challenge, the Court cited *United Church of Christ* and reaffirmed that "a licensee is 'granted the

free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise, it is burdened by enforceable public obligations.'" 453 U.S. at 395, quoting *United Church of Christ*, 359 F.2d at 1003. The Court recognized that the federal candidate access section of the Communications Act "represents an effort by Congress to ensure an important resource—the airwaves—will be used in the public interest." 453 U.S. at 397.

The Court's language in *CBS, Inc.* v. *FCC*, as well as the inescapable fact of governmental licensing of broadcasting, indicate that the argument that the Fairness Doctrine imposes an unconstitutional condition on the grant of broadcast licenses and upon the exercise of first amendment rights is without merit. As *CBS, Inc.* v. *FCC* indicates, such an argument is simply inapplicable in the context of broadcasting. In fact, the Court has found that imposing conditions such as those embodied in the Fairness Doctrine advances, rather than inhibits, first amendment values. The Court observed in *Red Lion* that:

> [T]o condition the granting or renewal of licenses on a willingness to present representative community views of controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. 395 U.S. at 394.

Similarly, in *FCC* v. *NCCB*, the Court rejected an argument that the Commission's cross-ownership restrictions "unconstitutionally condition[ed] receipt of a broadcast license upon forfeiture of the right to publish a newspaper," noting, *inter alia*, that the purpose and effect of the regulations was "to promote free speech, not to restrict it." 436 U.S. at 800–801. The import of these cases is that the government may properly impose conditions on the use of broadcast frequencies, such as the condition embodied in the Fairness Doctrine, where these restrictions further first amendment values.

Arguments by opponents of the Fairness Doctrine that the Supreme Court has undermined the constitutional underpinnings for the doctrine as misplaced. The Supreme Court has consistently reaffirmed that the scarcity of broadcast frequencies—the scarcity relative to demand for frequencies which necessitates governmental licensing—allows such reasonable regulations. Most recently, in *FCC* v. *League of Women Voters of California*, the Court reiterated that:

> [T]he fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in first amendment analysis is that '[b]roadcasting frequencies are a scarce resource [that] must be portioned out among applicants.' 104 S.Ct. at 3116, *quoting Columbia Broadcasting System Inc.* v. *Democratic National Committee*, 412 U.S. at 101.

The notion that a broadcaster is a public trustee has similarly been reaffirmed. In addition, the Court recognized the "substantial governmental interest" in "insuring adequate and balanced cover-

age of public issues" served by the Fairness Doctrine. 104 S.Ct. at 3118.

2. Spectrum scarcity

As set forth above, the premise underlying the Fairness Doctrine is that there are more people who want to broadcast—that is, air information to the general public—than available frequencies:

> The scarcity of frequencies should not be measured by the number of *stations* allowed to broadcast, but by the number of *individuals or groups* who wish to use the facilities, or would use them if they were more readily available. Emmerson, T., "The System of Freedom of Expression," 662, (1970 (emphasis in original).

The primary argument of opponents of the Fairness Doctrine is that the spectrum is not scarce because there are many more broadcast licenses than in 1949 or since *Red Lion*. However, the fact remains that the demand for broadcast stations far exceeds their availability.

The most obvious measure of relative demand for broadcast frequencies is the economic value of the valuable license conveyed by the government. The evidence shows that today millions to hundreds of millions of dollars are paid for broadcast stations and that the value of stations has increased greatly over the past thirty years. Independent VHF stations have recently sold for as much as $450 million in Boston, $510 million in Los Angeles, and more than $700 million in New York. "Changing Hands 1985," *Broadcasting*, January 27, 1986, at 91–110. Similarly, FM stations have sold for as much as $45 million (Pasadena, California), $27 million (St. Petersburg, Florida), and $32 million (Philadelphia, Pennsylvania). For a review of the record $6,192,699,871 worth of broadcast station sales during 1986 (for 1,279 stations), see "Stations and Cable Trading, 1986" Broadcasting, February 9, 1987, at 51–91. In contrast, in 1956 stations sales totaled $115,605,828; in 1966, $135,718,316; and in 1976, $290,293,477. In 1986, there were 102 television transactions, 213 FM, 312 AM, 217 AM/FM and 29 group sales (which involved a total of 88 AM's, 92 FM's and 17 TV's). Id.

Another gauge is the demand for new stations. It is as true today as in 1969 that "comparative hearings between competing applicants for broadcast spectrum are by no means a thing of the past." *Red Lion*, 395 U.S. at 388. As of November, 1986, the Commission had 142 pending comparative proceedings involving multiple applicants for broadcast facilities. Moreover, many of these proceedings, particularly those for facilities in major markets, involve large numbers of applicants. For example, 47 applicants recently applied for authorization to operate a new FM radio station on Channel 255A at Orlando, Florida. FCC Publication Notice, Report No. NA–28, released February 12, 1987. See also, Hearing Designation Order, MM–2356 49 Fed. Reg. 6994 (February 24, 1983) (26 applicants for deleted facilities of WHBI, Newark, New Jersey); Hearing Designation Order, MM–5467 released July 2, 1985 (16 applicants for new FM radio station, Tolleson, Arizona). Even the smaller markets generate multiple mutually exclusive applicants. See e.g., Hearing Designation Order, MM–1835, released January 9, 1986 (13

applicants for new UHF television station at Newton, New Jersey); Hearing Designation Order, MM-4416, released May 13, 1986 (12 applicants for new VHF television station at Avalon, California); Hearing Designation Order, DA 86-201, released November 20, 1986 (five applicants for new UHF television station at Charlottesville, Virginia); Hearing Designation Order, DA 87-299, released March 25, 1987 (14 applicants for new FM radio station at Smryna, Delaware); Hearing Designation Order, FCC DA 87-198, released March 13, 1987 (four applicants competing for new FM station at Ridgebury, Pennsylvania); Hearing Designation Order, FCC DA 87-272, released March 17, 1987 (three applicants designated for comparative hearing for new television station at Jackson, Wyoming); Hearing Designation Order, MM-5201, released June 13, 1986 (three applicants for non-commercial UHF television station at Milford, New Jersey). In fact, on one day, March 17, 1987, the Commission designated 20 applications for hearings for seven broadcast stations. See FCC Daily Digest, Mimeo No. 2372, March 17, 1987.

In other contexts, the Commission itself has acknowledged that there is a "scarcity of spectrum." See, e.g. *FM Subsidiary Communications Authorizations,* 55 RR 2d (P&F) 1607, 1613 n. 19 (1984), rev'd on other grounds, People of the State of California v. *FCC, No. 85-1112 (D.C. Cir., August 22, 1986). In the FM Subsidary* proceeding, the Commission stated:

> [T]he mandate of Section 301 that we provide for the use of channels authorizes the Commission to allocate the Nation's scarce spectrum resources. In attempting to satisfy that mandate, the public's need for new or additional services must be balanced against the limited spectrum available. In sum, we strive for economy in the use of spectrum.

In "FCC Discovers That Carving Up the Spectrum Isn't What It Used To Be," National Journal, May 19, 1984, at 983, Dale N. Hatfield, a communications consultant and one time deputy Administrator at the National Telecommunications and Information Administration, summed up the problem: "The appetite for new spectrum space is unlikely to be sated any time soon. Technology has expanded the number of usable radio frequencies enormously in the past decade, but demand is growing even faster—and will continue to * * *." Similarly, Ken Nichols, deputy chief of the Commission's Spectrum Management Division, in describing one industry's search for spectrum, noted that: "They [the cordless industry] don't want a lot [of UHF frequencies] * * * [t]he problem is, there isn't a lot left". Id. at 983.

Battles over allocation of spectrum often develop into the longest and most ferocious proceedings before the Commission, and for good reason. It is virtually impossible to offer communications services without spectrum. When such an essential resource is divided by the number of current and proposed services, severe conflicts and difficult choices as the result. The Commission has devoted almost 17 years to resolving competing claims for the same spectrum lodged by the cellular radio industry, providers of land mobile service, public safety officials, and proponents of a mobile

satellite service.[2] See Report and Order (Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, FCC 86-333 released September 26, 1986. See Notice of Proposed Rulemaking, (Gen. Docket 82-334) 48 Fed. Reg. 6730 (February 15, 1983); Report and Order, 81 RR 2d 1341 (1982); Second Report and Order, (Gen. Docket 334) 50 Fed. Reg. 7338 (February 22, 1985); Second Report and Order, Gen. Docket 82-334) 50 Fed. Reg. 51420 (December 17, 1985); Third Report and Order, FCC-523 released February 23, 1987. See also, First Report and Order and Second Notice of Inquiry, (Docket No. 18262) 35 Fed. Reg. 8644 (June 4, 1970); Second Report and Order, (Docket No. 18262) 46 FCC 2d 752 (1974) on recon. 51 FCC 2d 945 (1975); Order on recon. FCC 78-854 (1978) aff'd *Sub. nom NARUC* v. *FCC,* 525 F. 2d. 630 (D.C. Cir. 1976), cert denied. 425 U.S. 992 (1976).

With the advent of Direct Broadcast Satellites (DBS), the Commission spent years determining whether to reallocate a portion of the spectrum for use by DBS systems. See, Report and Order, 51 RR 2d 1341(1982). In reallocating a portion of the 12 GHz band for use by DBS, the Commission displaced certain private fixed microwave users. The Commission has spent the last five years trying to allocate frequencies for those fixed services users.

Most recently, the Commission has been wrestling with the issue of whether to reallocate certain UHF-TV frequencies for land mobile services. Broadcasters and the proponents of High Definition Television (HDTV) vigorously oppose the proposal. Although HDTV is not yet available to the public, its supporters anticipate that it will be on the air in a few years. Consequently, it is argued that the UHF-TV frequencies should be reserved for HDTV. After conducting an inquiry (which commenced several years ago) into the proposed reallocation of spectrum to land mobile, the Commission determined that the record was not sufficient to render a decision on the appropriate use of the available UHF-TV spectrum. The Commission is now gathering additional evidence. See Communications Daily, March 12, 1987. p.1.

These are just a few of the recent spectrum battles. There have been many more, including between public safety services and broadcasters, amateur radio operators and land mobile services, common carrier and private mobile services. There have also been conflicts within services, for example, when television broadcasters opposed VHF-Dropins. The Committee knows of most of these battles first hand, since parties want the Committee's support for their positions at the Commission. The conclusion we must draw is that spectrum is scarce; demand for exceeds supply. Even the National Association of Broadcasters, which opposes S. 742, agrees with this conclusion. As Edward Fritts, the President of the National Association of Broadcasters, recently stated: "No one challenges the fact that valuable spectrum space is scarce * * *. [It] should be used to serve all the public."

In its 1985 Fairness Doctrine Report, the Commission contends that the increase in the number of broadcast stations undercuts the scarcity rationale articulated in Red Lion.

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[2] In its Report and order (General Docket Nos. 84-1231, 1233, and 1234 at para. 3, the Commission stated, "Since the late 1960's, we have recognized that without additional allocations serious land mobile spectrum shortfalls would develop before the end of the century."

Service	1969	1987
AM	4,265	4,866
FM	2,330	5,208
VHF-TV	577	656
UHF-TV	260	640

The growth in the number of broadcast stations, however, has not occurred in isolation. The Nation's population has soared over the last 18 years, from 202,494,000 in 1969[3] to 241,078,000 in 1986.[4] Accompanying the population growth have been increased media literacy and the recognition of the ability of broadcasting to serve as an effective means of communications. In addition, there are the already demonstrated tremendous number of new services seeking spectrum. As a result, while there may be more stations, there are also many more parties who would like to use those stations. in reality, scarcity is at least as great a problem as in the past.

In its 1985 Fairness Doctrine Report, the Commission refers to the number of vacant FM and television channels as support for its assertion that there is no longer a shortage of spectrum. 1985 Fairness Doctrine Report, 102 FCC 2d at 202-208. According to the Commission, in 1987, there are 63 VHF (20 non-commercial and 43 commercial) channels and 431 UHF channels (338 non-commercial and 93 commercial) vacant. There are, however, only 10 commercial vacancies,[5] all UHF, in the top 50 markets. See FCC Public Notice Mimeo 2365, March 23, 1987. In addition, the Commission's claim that there are a large number of vacant FM channels rests largely on the creation of 689 new FM channels in 1985. See 1985 Fairness Doctrine Report 102 FCC2d at 203; Report and Order (Docket 80-90), 53 FCC 2d 1550 (1983); First Report and Order, (MM Docket No. 84-231), 50 Fed. Reg. 3514, January 25, 1985; Second Report and Order (MM Docket No. 84-231), FCC 85-124, released April 12, 1985. At the same time, the Commission has been inundated with applications for available broadcast channels.

The Commission and opponents of the Fairness Doctrine also cite new methods of transmitting information—"new technologies"—as another factor that undercuts the scarcity rationale. We reject those arguments for several reasons. First, scarcity is not a matter of the absolute number of broadcast outlets or new forms of electronic media; as long as more people seek licenses to use the spectrum than can be accommodated, there is scarcity. Second, as noted above, the arguments ignore the fact that broadcasters are statutorily obligated to serve as public trustees, granted the use of a valuable resource, and, in return, can and should be subject to modest requirements to assure that their trust is exercised in the public interest. Third, we disagree that scarcity is a thing of the past, even in absolute terms. Of these new technologies, cited by the Commission, only cable television has even begun to reach a significant number of households, and a great deal of what cable offers

[3] Estimated resident population of the United States and Components of Change U.S. Census Bureau, p. 25, No. 99 (July 1986).

[4] See Estimates of Population of United States by Age, Sex, and Race; U.S. Census Bureau Series, p. 25, No. 1000 (February, 1987).

[5] Within 55 miles of the ADI title city.

and what its audience watches is retransmitted over "conventional" television stations.

The data cited by the Commission show that 62 percent of the American households are passed by cable. See, Notice of Inquiry, FCC 84-140, Released May 8, 1984, 18-19. However, the Commission may have overestimated the number of homes passed. According to recent data, only 57 percent of the American households are passed by cable as of November 30, 1986. See, Paul Kagan Associates Cable TV Programming News Roundup, November 25, 1986, p. 1. Further analysis demonstrates that, if anything, homes passed can be a deceptive measure of meaningful impact. National penetration ignores the large proportions of communities where there is no cable at all. When individuals markets are examined, the degree of cable penetration varies substantially. As of 1986, a significant number of the top 20 cities remain unwired or only partially wired, including Chicago[6], Boston, Philadelphia, Washington, D.C.[7], Detroit, Sacramento, and Minneapolis-St Paul.[8] Id.

Moreover, even where cable is available, only about half the homes passed typically subscribe. See Paul Kagan, supra. There are approximately 37,908 million cable subscribers; this is only about 44 percent of all the American television households. Id. Many of those subscribers are limited to "basic" or retransmitted broadcast service. Because cable lacks market power to certain instances, Congress deregulated parts of its operations in 1984.

To the extent that the Commission relies on other technologies, such reliance is tenuous at best. For example, as of December 1986, there were only an estimated 250,000 Multipoint Distribution System subscribers, or 0.63 percent of the 84 million television homes. Similarly, Satellite Master Antenna Systems (SMATV) have only an estimated 450,000 subscribers, or 0.19 percent of American households. See, Paul Kagan, Cable TV Programming, December 27, 1986. Other new services such as Low-Power Television (LPTV)[9] are just beginning to operate. As of March 1987, there were only 428 LPTV stations in operation. Teletext service has just barely gotten started, and is stymied by considerable marketing problems and the lack of technical standards.

Direct Broadcast Satellite Service and Multichannel Multipoint Distribution Systems can be found in the Commission's rules, but not in the marketplace. In general, the Committee has received no hard evidence that any of these new over-the-air services will succeed. Further, the Committee believes it is highly questionable whether these new services will provide the public with news and public affairs programming. It is fallacious to refer to the growth of videocassette recorders, for example, compare them to broadcast stations, and claim they provide alternatives for the discussion of matters of public importance and increase the knowledge vital to our citizens. As of today, these new services may offer promise of this but little more.

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[6] Chicago's system is reported as being approximately 35 percent complete.

[7] Washington, D.C. has 1,500 subscribers.

[8] Moreover, none of these cities are listed in the TOP 50 Cable Systems. See International Communications Research, CableVision, December 1, 1986 p. 149.

[9] LPTV stations are over-the-air televisions stations that are limited to 10 watts for VHF and 1,000 Watts for UHF.

The opponents of the Fairness Doctrine regularly argue that it is newspapers that are truly scarce, not broadcast stations. The base this on the fact that the number of daily newspapers in this country has decreased significantly over the past thirty years, that few cities have more than one daily newspaper, and that is it very difficult to start a new daily newspaper. While comparisons between the broadcast media and daily newspapers may seem relevant to the question of the appropriate scope of government control over broadcast licensees, in fact, they have little validity.

Comparison of broadcasting outlets and daily newspapers completely ignores the government's essential and long-established role in allocating and licensing spectrum, including the broadcast frequencies. As was discussed above, the American system of broadcasting is an artificial construct resulting from this government control. There did not have to be such a system; in fact, nothing required the creation of broadcasting at all. Video programming could have travelled into our homes by wire, as with cable television. Competition for this spectrum has been fierce. Many spectrum users and potential users would want these "broadcast' frequencies and use them extensively. As a trade-off for the unique system of broadcasting our government created, licensees have certain obligations. So long as potential licensees have no alternative media to sue, these obligations need to remain in effect.

In contrast, there are no similar, government created limitations to entry into the newspaper field.[10] No government license is required. While the current economics of the daily newspaper market are such that it is difficult today for more than one daily to exist in each market, anyone can freely enter. That is what the Washington Times in Washington, DC did. By comparison, entry into broadcasting is limited by a physical scarcity of spectrum that is allocated solely by the government. In the same market in which the Washington Times was able to begin publishing only a few years ago, for instance, there are no open broadcast frequencies.

To demonstrate further that there are few, if any, alternatives to holding a broadcast license, one should examine the Committee's 1985 hearings on the Clean Campaign Act, legislation concerning the use of broadcasting during election campaigns. Throughout these hearings, the Committee heard testimony that broadcast media and other media were not comparable, that election campaigns were largely run with broadcast advertisements, and that this was where between 50 percent and 90 percent of a candidate's funding was spent. The most telling statement about this fact was made by Curtis Gans, Vice-President and Executive Director of the Committee for the Study of the American Electorate, who said: "television is not simply another means of communication. It is to conventional means of communication what nuclear weaponry is to conventional weaponry."

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[10] There are, however, certain content related regulations newspapers must comply with in order to obtain certain government bestowed benefits. For example, newspapers must devote at least twenty-five percent of their space to news and editorials in order to obtain the lower second class postage rate. The second class mailing permit, a government subsidy, "is based upon the concept that the electorate in a free democracy must be informed." See 1985 Fairness Hearing, statement of Roy M. Fisher.

While this evidence may be seen as support for broadcasting's importance or effectiveness, that is not why it is mentioned and supportive of the Committee's finding. Rather, it establishes a rationale for the tremendous demand to hold broadcast licenses and helps explain why all the alternatives given by the Commission in its 1985 Fairness Doctrine Report are not comparable in fact.

3. The Fairness Doctrine increases speech on important issues

At the March 18th hearing on S. 742, Charles Ferris, a former Chairman of the FCC Commission, articulated the "beauty" of the Fairness Doctrine:

> It furthers First Amendment Principles, because it requires more information * * * the only remedy under the Fairness Doctrine, if you go through the process * * * is: Go out and cover the story some more, more information; do not let it be one sided, do not let it be out of balance.

An examination of the day-to-day workings of the Fairness Doctrine demonstrates that Mr. Ferris is correct. Rather than operating to restrict speech, the Fairness Doctrine increases speech on issues of public importance. The Fairness Doctrine has effectively served the substantial government interest recognized in *Red Lion* and *League of Women Voters* in guaranteeing that the public receives contrasting viewpoints on controversial issues of public importance and has also vindicated the interests of non-media speakers in airing their viewpoints. The Supreme Court, based upon twenty years of experience with the doctrine, found this to be the case in *Red Lion,* as did the Federal Communications Commission in 1974. 1974 Fairness Report, 48 FCC 2d 1 (1974).

No material changes in circumstances have undermined these conclusions. The Fairness Doctrine has created substantial opportunities for expression by those "who wish to exercise their freedom of speech even though they are not members of the press." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964). While the Fairness Doctrine does not confer upon any particular group or individual a right to air their views,[11] both the courts[12] and the Commission have recognized that broadcasters should, as one means of complying with Fairness Doctrine obligations, allow speakers to present their own views directly to the public. For example, the Commission has stated that:

> As a public trustee [the broadcaster] must present representative community views and voices on controversial issues which are of importance to his listeners . . . and this means also that some of the voices must be partisan. A licensee policy of excluding partisan voices and always itself presenting views in a bland inoffensive manner would run counter to the "profound national commitment

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[11] As noted infra, under the Fairness Doctrine, the Commission accords broadcasters substantial discretion in determining how to meet their Fairness Doctrine obligation in any particular case.

[12] See *Columbia Broadcasting System,* v. *Democratic National Committee,* 412 U.S. at 111-112, 131, *Cf. Red Lion,* 395 U.S. at 392, n.18 (noting importance of expression of opposing views by persons who actually believe them).

> that debate on public interest issues should be uninhibited, robust, and wide open."

Democratic National Committee, 25 FCC 2d 216, 222-23 (1970). See also *Cullman Broadcasting Co.,* 40 FCC 576, 577 (1963) (where a licensee permits use of its facilities for expression of one viewpoint on a controversial issue, reasonable opportunities must be afforded for "presentation of contrasting views by spokesmen by other responsible groups").

The Fairness Doctrine has provided significant opportunities for individual and group expression both formally before the Commission and in direct informal negotiations with broadcasters for coverage of opposing views on critical issues. See generally F. Rowan, "Broadcast Fairness: Doctrine, Practice, Prospects," 71-88 (1984). Through such negotiations, groups and individuals have obtained free and paid advertising time as well as opportunities to appear on news programs and talk shows. Andrew Schwartzman, executive director of the Media Access Project, has stated that "most of the dealings with the Fairness Doctrine are informal, the more informal the better so that local groups get to establish an ongoing relationship with the news people of the local station." F. Rowan, Broadcast Fairness, at 72.

Indeed, in its recent Report, the Commission points to cases in which groups have used the Fairness Doctrine in order to obtain advertising time which would otherwise have been denied. 1985 Fairness Doctrine Report, 102 FCC 2d at 162-63, n.73. Without the Fairness Doctrine, it is far from certain that many broadcasters would even discuss reasonable requests from individuals or groups seeking to present their views. In recent Congressional hearings, several groups testified that, if not for the Fairness Doctrine, they would not have been granted access to broadcasting facilities. Freedom of Expression Act of 1983: Hearings on S. 1917 before the Senate Committee on Commerce, Science, and Transportation, 98th Congress, 2d Session, 101-04, 131-42 (1984).

For example, Elaine Donnelly, Special Projects Director, Eagle Forum, testified that from 1972-1982, 95 percent of the network broadcasts devoted to the Equal Rights Amendment (ERA) presented the pro-ERA viewpoints. The anti-ERA positions represented only 5 percent of the total airtime devoted to the subject. Ms. Donnelly stated that: "If it were not for the fairness rules that the women of the Eagle Forum invoked at the local level, as a means to exercise our rights of free speech, it is entirely possible that ERA would have been ratified without any real understanding of its true effect." Freedom of Expression Hearings (1984) at 132. Ms. Donnelly went on to point out that the "fairness rules are neutral in their impact, available to liberals and conservatives, pros and cons alike, no matter what the issue might be." Id. See also Statements of Robert Gurss, Media Access Project, Id. at 91-95; Reed Irvine, Accuracy in Media, Id. at 97-98; Ronald W. Cahtell, National Association of Arab Americans. Id. at 98-104.

Opponents of the doctrine have seized upon the "findings" in the Commission's 1985 Fairness Doctrine Report to conclude that the doctrine inhibits speech. But the Commission completely ignored the well-documented use of the Fairness Doctrine by countless indi-

viduals and groups seeking to air their views.[13] The failure of the Commission to appreciate that formal and informal use of the Fairness Doctrine has created countless opportunities for expression, as well as its failure to take into account the speech added by uncontested compliance with the doctrine, totally undermines the Commission's conclusion that the Fairness Doctrine "overall lessens the flow of diverse viewpoints." 1985 Fairness Doctrine Report, 102 FCC 2d at 171.

Chairman Fowler testified at the March 18th hearing that the Commission received approximately 75 "anecodotes" demonstrating how the Fairness Doctrine has been used to "shake down" and intimidate broadcasters. These anecodotes cited by the Commission in the 1985 Fairness Doctrine Report include a number of examples where public interest groups had described situations where they had succeeded in obtaining airtime to present an opposing viewpoint, without involving the Commission. In other words, many of these groups were praising both the Fairness Doctrine and the broadcasters, citing examples where the doctrine worked. The Commission twisted those comments to turn them into instances of alleged "intimidation" of the broadcasters by the very public the broadcasters are licensed to serve.

Chairman Fowler also conceded at the March 8th hearing that those examples spanned over 20 years, from the "1960's through to our most recent case * * * in either '84 or '85". Moreover, many of the examples that occurred prior to 1979 were raised before the Commission and found unpersuasive as evidence of the doctrine's chilling effect by the Commission in its affirmation of the doctrine in 1974, in 1976 on reconsideration, and again in 1979. See, 1974 Fairness Report, 48 FCC 2d 1 (1974), recon. denied, 58 FCC 2d 691 (1976) aff'd sub nom. *National Citizens Committee for Broadcasting* v. *FCC*, 567 F.2d 1095 (D.C. Cir. 1977), cert. denied, 436 U.S. 926 (1978); Fairness Doctrine Inquiry, 74 FCC 2d at 168–177.

In reality, Chairman Fowler's portrayal of the Fairness Doctrine at work was grossly distorted. Thomas Goodgame, President, Television Station Group, Westinghouse Broadcasting Company (a 34-year veteran of the broadcast business, including 17 years as a TV station general manager for Group W and other broadcast groups, 16 years as sales manager, one year as general manager of KATV in Little Rock, Arkansas, and one year as Vice President and General Manager of KTUL, Tulsa, Oklahoma) testified at the recent hearing that Group W, one of the major holders of broadcast stations, has never had any problems complying with its fairness obligations. In fact, Group W has had a policy "that basically followed the Fairness Doctrine since 1947" and that policy does not still its editorial voice.

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[13] See e.g., Comments of Media Access Project and Telecommunications Research and Action Center (in Gen. Docket 84-282), filed September 6, 1984; Comments of Henry Geller and Donna Lambert (in Gen. Docket 84-282), filed September 6, 1984; Comments of the Office of Communication of the United Church of Christ, The Unitarian Universalist Association, The Communication Commission of the National Council of Churches of Christ in the U.S.A., Everett C. Parker and Al Swift, (in Gen. Docket 84-282), filed September 6, 1984. See also Letter to Chairman Mark Fowler from Safe Energy Communication Council, March 4, 1987 (describing case histories involving stations in over 14 States showing how "smoothly the Fairness Doctrine operates in practice").

Further, as set forth in the Reply Comments of Media Access Project and TRAC, (filed November 8, 1984 in Gen Docket No. 84-282), of the 45 examples set forth by the National Association of Broadcasters,[14] only 11 have not been raised previously. MAP Reply Comments at 27. As set forth by MAP:

(1) Several of the NAB's cases are merely write ups of previously decided cases.

(2) NAB example numbers 18-24 are excerpts of testimony presented in the 1983-84 Senate Freedom of Expression Hearings in support of S. 1917, a Fairness Doctrine repeal bill. The Senate Communications Subcommittee soundly defeated that bill, obviously unpersuaded by these examples.

(3) NAB examples 25-28 and 35-39 were statements made during the 1975 Senate hearings on the Fairness Doctrine repeal, which was also rejected.

(4) Examples 29 and 30 were presented to a House Subcommittee in 1968, 16 years ago and before *Red Line.*

(5) Example 34 is from a Statement to another Senate Committee supporting a constitutional amendment repealing the Fairness Doctrine—which was also rejected.

(6) Examples 40-45 are excerpts taken in and out of context from published books and articles.

(7) Three of the examples (17, 20 and 24) refer to the same case.

(8) Eleven examples are mere policy statements, not specific incidents, stories or events. (See 8, 22, 32, 34, 35, 36, 37, 38, 39, 44 and 45.)

(9) A large number of the examples are recitations of so-called costs incurred in complying with the Fairness Doctrine (*See* 2, 3, 7, 12, 13, 15, 16, 17, 18, 19, 21, 22, 23, 24 and 25). Many of these complaints require no more than the cost of a stamp or a phone call to resolve. Moreover, the Commission has only requested that licensees respond to a handful of complaints, and very few licencees, therefore, actually incur any significant legal fees or other costs.

(10) Finally, many of the NAB's examples are so vague as to render them meaningless. For example, examples 4 and 6 are anonymous claims that consist of nothing more than two licensees who state they routinely avoid controversial issues. These kinds of self-serving statements, devoid of any specificity, are insufficient for the Commission to utilize as the basis for any findings, much less repeal of the Fairness Doctrine.

The Committee is not taking the position that the Fairness Doctrine does not impose a burden on licensees. Rather, the Committee does not impose a burden on licensees. Rather, the Committee believes that the burden is both necessary and minimal. As the Court stated in *Red Lion,* "[It] is the right of the viewers and listeners, not the right of the broadcasters which is paramount." 395 U.S. at 390. While the Communications Act limits the rights of the viewers and listeners by excluding speakers from the airwaves, it balances this restriction by enhancing speech through the Fairness Doctrine.

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[14] See Comments of the National Association of Broadcasters (in General Docket No. 84-282), filed September 6, 1984 cited by the FCC in its 1985 Fairness Doctrine Report, 102 FCC 2d at 162-179.

The Commission's attempt to establish a "chilling effect" is flawed. The Supreme Court in *Red Lion* found that the risk of chill was speculative. 395 U.S. at 367. Thirteen years ago, in an inquiry very similar to that recently undertaken, the Commission examined the issue of whether the Fairness Doctrine reduced the amount and quality of coverage of controversial issues of public importance. After two years of study consuming thousands of staff hours, in which the Commission reviewed claims offered or very similar to those offered in the Commission's recent proceeding, the Commission found "no credible evidence of a chilling effect." 1974 Fairness Report, 48 FCC 2d at 8.

Similarly, in 1979, the Commission completed yet another review of the Fairness Doctrine. See Report and Order (Fairness Doctrine) 74 FCC 2d 163 (1979). In that proceeding, the Commission analyzed various proposals concerning the application of the doctrine by licensees. In rejecting the proposals to alter the application of the doctrine, the Commission stated:

> Over the course of thirty years this Commission has obtained valuable experience with respect to the actual efficacy and enforcement of the Fairness Doctrine * * *. After careful consideration, we conclude that the existing scheme is based on sound policy, even if the established case-by-case analysis has been shown to present some administrative difficulties * * * [t]he foundation stone of the American system of broadcasting is the right of the public to be informed rather than the right on the part of any individual member of the public to broadcast his own particular views on any matter * * *. Id. at 169.

Despite these prior findings, the Commission in its 1985 Fairness Doctrine Report purported to find evidence that the Fairness Doctrine chilled broadcast speech. The Commission's evidence, however, consists solely of broadcasters' accounts of the effects of the Fairness Doctrine. There was no detailed and well-documented evidence presented, only isolated anecdotes. As indicated, the Commission also failed to discuss realistically, much less weigh, evidence in the record demonstrating that various individuals and groups have used the Fairness Doctrine in order to obtain broadcast time. Perhaps most importantly, however, the Commission failed to discuss why the allegations of broadcasters were any more persuasive in this proceeding than they were when they were presented to the Supreme Court in *Red Lion* and to the Commission in the 1970's. Further, as the Court recognized in *Red Lion*, but the Commission ignored, "if licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues." 395 U.S. at 393. After all, the Fairness Doctrine contains an affirmative obligation on the part of broadcasters to air matters of public importance.

Vindication of competing first amendment interests in the broadcasting realm by the Fairness Doctrine is achieved with minimal intrusion into the editorial discretion of broadcasters, since the Commission and the courts have carefully circumscribed the scope of the doctrine in order to minimize any intrusion. Before the Commission will even ask a broadcaster to comment upon a Fairness

Doctrine complaint, the complainant must present "detailed and specific evidence", Alan C. Phelps, 21 FCC 2d 12, 13 (1969), on a variety of issues [15] sufficient to establish a prima facie violation. This prima facie evidence requirement is carefully designed to "weed out those complaints that would burden broadcasters without sufficient likelihood that a countervailing benefit will be gained." *American Security Council* v. *FCC*, 607 F.2d 438, 452 (D.C. Cir. 1979) (en banc). A broadcaster's judgment must simply be in good faith and reasonable in order to be upheld. As one journalist put it, the Commission will question a broadcaster only when the "station's position is so 'off the wall' that no reasonable person could accept it." Ford Rowen, Broadcst Fairness at 65.

Only a tiny portion of a complaints result in any Commission action whatsoever. For example, as set forth above, in 1986, the Commission requested only 6 broadcasters to respond to Fairness Doctrine and political broadcasting complaints even though the Commission received an estimated 5,509 complaints in all. *See* Letter to Senator Inouye, from Chairman Mark Fowler, March 20, 1987. In cases where the Commission has determined that a licensee has not met its Fairness Doctrine obligations, broadcasters were simply advised to provide additional programming. See *American Security Council Education Foundation* v. *FCC*, 607 F.2d at 447; In Re Applicability of Fairness Doctrine in Handling of Controversial Issues of Public Importance, 40 FCC 598, 599 (1964). The Commission's deference to broadcasters has been reinforced by the courts, which have carefully protected the rights of broadcasters and have scrutinized the Commission's decisions more closely than those of other regulatory agencies. See, e.g., *Strauss Communications, Inc.* v. *FCC*, 530 F.2d 1001, 1011 (D.C. Cir. 1976); Polsby, "Candidate Access To The Air: The Uncertain Future of Broadcaster Discretion," 1981 Sup. Ct. Rev. 223, 1984 (1981).

Finally, arguments as to the "chilling effect", such as those found in the Commission's 1985 Fairness Doctrine Report, erroneously assume that this type of "finding" would suffice to establish a first amendment violation. However, a "chill" can only arise from an unwillingness on the part of broadcasters to air both sides of an issue, an unwillingness to act as a public trustee to vindicate the substantial government interest in the balance of information reaching the public. In fact, broadcasters need only fear any consequences when they decide to present only one side of an issue in their overall programming. A broadcaster who acts according to the standards of his or her profession, on the other hand, has nothing to fear from the Fairness Doctrine, since it is only applied in the most egregious cases of imbalance. In the only recent Commission decision to arrive at a finding of a Fairness Doctrine violation, the Commission found that the license broadcasted a total of 187 minutes on a controversial issue of public importance while airing opposing viewpoints for only 22 minutes. See Syracuse Peace Council, 99 FCC 2d 1389, 1400 (1984), on recon., 59 RR 2d 179 (1985).

The Chill argument is thus an attempt to clothe in first amendment language a refusal on the part of broadcasters to fulfill the

[15] See p. 7, supra.

commitments they gave in return for the free grant of a valuable public privilege. As a matter of first amendment jurisprudence, however, government may legitimately seek such a *quid pro quo* for grant of public privileges. This recognition is not limited to the context of broadcasting, but extends to other activities protected by the first amendment. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Supreme Court struck down as violative of the first amendment limitations on campaign expenditures in the Federal Election Commission Act of 1971. However, it upheld those same limitations on expenditures of candidates who accepted public financing of their campaigns. See 424 U.S. at 85–104. See also *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983) (holding that government may condition tax-exempt status on absence of lobbying activities).

Lack of knowledge of the meaning of the Fairness Doctrine and how it is applied by the Commission accounts for a great deal of broadcasters' "fear" of the Fairness Doctrine and their belief that it chills their first amendment rights. The Fairness Doctrine is largely a self-enforcing rule which rarely requires significant time or resources from either the Commission or deviation from sound journalistic practices by licensees. As demonstrated above, the Fairness Doctrine, as enforced by the Commission, only requires licensees to respond to a minute percentage of the complaints filed.

In the late 1970's, the Commission, realizing that broadcasters often misunderstand the Fairness Doctrine, had the staff prepare a Primer to explain the doctrine. This was virtually completed in 1981, but the Commission has never released it to the public. To foster greater certainty, the Committee has attached this 1981 version of the Primer as Appendix 2 of this Report. The Primer describes the Fairness Doctrine, its purpose and limitations, defines controversial issues, and broadcasters obligations. In addition, the Primer provides specific examples of when the doctrine should be applied and more importantly, when it does not apply. Because it is a 1981 draft, the Primer does not contain Commission actions since then, particularly the NCPAC case. (National Conservative Political Action Committee, 51 RR 2d 233 (1982)).

If broadcasters had access to the Primer, many of their misconceptions and fears would be resolved. The Commission, rather than demonstrate the ease with which broadcasters apply the doctrine, has left them unenlightened, causing unnecessary confusion and distress. The Committee believes that the Primer or some similar form of guidance should be updated and provided promptly to broadcasters and the general public.

CONCLUSION

The debate on the Fairness Doctrine is, at its roots, a debate over government control over a public resource, the spectrum. Under the current, American system of broadcasting, the Commission has decided to allocate a relatively limited amount of this spectrum and permit each licensee to control the content of what is transmitted over this spectrum. To balance the limited number of opportunities the public has to become licensees and to provide the public with a greater number of voices, the Commission has required

these broadcast licensees to act as public trustees. The Fairness Doctrine is a fundamental requirement of this public trust. Without it, the public trust would mean little.

Throughout this report, the Committee has demonstrated that the underpinnings of the Fairness Doctrine remain strong. Scarcity of the spectrum, few alternatives to broadcast licenses, the effectiveness of the doctrine, and the de minimis burden on broadcasters, all are as sound a rationale as when the doctrine was adopted and when it was upheld by the Supreme Court. It is for these reasons that the Committee needs to ensure the continuation of the Fairness Doctrine, a doctrine that has proven over its history that it enhances speech and the provision of information to the public.

With the Commission's elimination of many of the public trust requirements of broadcasters, there has been a tremendous turnover in the ownership of broadcast stations. In a sense, the risk of having a license taken away by the Commission has been significantly reduced, and consequently, they are being treated somewhat like other commodities. As a result of this great change in ownership, the industry is no longer dominated by those who have had a commitment to serve the public. Many of the new owners are faceless corporations who have regard only for the value of the license and the ability to turn it over for profit, not for the service responsibilities that are entailed.

This is a troubling trend. The committee does not agree with the Chairman of the Commission, Mr. Fowler, that broadcast stations should be treated like "toasters." While the Committee has sanctioned much of the deregulatory measures for the broadcast service, the Committee continues to believe strongly that the broadcast marketplace is not so competitive as to relieve broadcasters of their public trust obligations. The Fairness Doctrine is at the heart of these obligations, a fact noted by the Commission in keeping the Fairness Doctrine as a safety valve for the deregulatory steps that have occurred so far. The doctrine takes on added importance in this new broadcast environment. For all of the reasons provided in this report, the Committee believes the Fairness Doctrine must be retained and S. 742 enacted.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, March 30, 1987.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 742, the Fairness in Broadcasting Act of 1987, as ordered reported by the Senate Committee on Commerce, Science and Transportation, March 24, 1987.

S. 742 would codify the Fairness Doctrine of the Federal Communications Commission (FCC) by requiring broadcasts to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The bill specifies that enforcement and application of this requirement would be consistent with the rules and policies of the commission already in effect as of January 1, 1987.

Enactment of this bill, in the absence of a formal action by the commission to repeal the doctrine, would have the effect of continuing existing FCC policy. CBO therefore estimates that S. 742 would result in no significant additional cost to the federal government and in no cost to state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

The bill, as reported, will clarify the Commission's existing authority to ensure that broadcast licensees provide information on important public issues an that the information is presented fairly. It thus will have no effect on the number of individuals regulated or the personal privacy of such persons. The costs of compliance and the amount of paperwork should be consistent with current levels.

SECTION-BY-SECTION ANALYSIS

SECTION 1. SHORT TITLE

This Section provides that this Act may be cited as the "Fairness in Broadcasting Act of 1987".

SECTION 2. FINDINGS

The Congress finds that:

(1) Despite technological advances, the electromagnetic spectrum remains a scarce and valuable resource;

(2) There are still substantially more people who want to broadcast than there are frequencies available;

(3) A broadcast license confers the right to use a valuable public resource and a broadcaster is therefore required to utilize that resource as a trustee for the American people;

(4) There is a substantial governmental interest in conditioning the award or renewal of a broadcast license on the requirement that the licensee ensure the widest possible dissemination of information from diverse and antagonistic sources by presenting a reasonable opportunity for the discussion of conflicting views on issues of public importance;

(5) While new video and audio services have been proposed and introduced, many have not succeeded, and even those that

are operating reach a far smaller audience than broadcast stations;

(6) Even when and where new video and audio services are available, they do not provide meaningful alternatives to broadcast stations for the dissemination of news and public affairs;

(7) For more than thirty years, the Fairness Doctrine and its corollaries, as developed by the Commission on the basis of the provisions of the Communications Act of 1934, have enhanced free speech by securing the paramount right of the broadcast audience to robust debate on issues of public importance; and

(8) The Fairness Doctrine (A) fairly reflects the statutory obligations of broadcasters under the Communications Act of 1934 to operate in the public interest, (B) was given statutory approval by the Congress in making certain amendments to that Act in 1959, and (C) strikes a reasonable balance among the first amendment rights of the public, broadcast licensees, and speakers other than owners of broadcast facilities.

SECTION 3.—AMENDMENT TO THE COMMUNICATIONS ACT OF 1934

(a)(1) This subsection contains the Fairness Doctrine. It obligates broadcast licensees (1) to cover issues of public importance and (2) to do so in a balanced fashion. The first part is an affirmative obligation on broadcast licensees to provide adequate coverage of certain local and national issues of vital or critical importance to a community or nation. See *Representative Patsy Mink* v. *WHAR*, 59 FCC 2d 987 (1976). The Commission has not frequently invoked this so-called "first half" of the doctrine. In the event that, in the future, the Commission should be concerned that there is some diminution in a broadcaster's coverage of issues, the Commission should more vigorously apply this provision "to insist that they [broadcast licensees] give adequate and fair attention to public issues." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 393 (1969).

The second part contains the obligation that broadcast licensees air conflicting views on matters of public importance. Under this provision, a licensee is required to provide a forum for all opposing views on a program or series of programs when one side of a controversial issue is presented. A licensee, however, is not required to provide "equal time" to the opposing viewpoints. Licensees are only expected to make provision for the opposing views in their overall programming. They are expected to present the issues fairly. "[T]here is no requirement that any precisely equal balance of views be achieved, and * * * all matters concerning the particular opposing views be presented and the appropriate spokesman and format for their presentation are left to the licensee's discretion subject only to a standard of reasonableness and good faith." Fairness Report, 48 FCC 2d at 18 (1974). See also, The Fairness Doctrine, How it applies to Broadcasting and Cablecasters, attached as Appendix 2 of this Report.

(a)(2) This subsection provides that the enforcement and application of the Fairness Doctrine shall be consistent with the rules and policies in effect on January 1, 1987. This provision is designed to ensure that the rationale underlying the key rules and policies of

the Fairness Doctrine continue to be addressed and that the Commission's enforcement of these rules and policies not be abandoned to "marketplace forces" in lieu of the enforcement mechanisms that have been developed by the Commission since 1949. In particular, the Committee wants to ensure the retention of the core policies embodied in the personal attack rule, 47 CFR 73.1920, the political editorialized rule, 47 CFR 73.1930, and those dealing with elections and ballot issues. As to the latter, it is vital that Fairness Doctrine issues concerning candidates or ballot propositions be resolved expeditiously within the campaign period. The Committee intends that the present practice of issuing timely rulings be retained. In addition, the Committee intends subsection (a)(2) to, inter alia, maintain in place the rules and policies embodied in *In re Nicholas Zapple*, 23 FCC 2d 707 (1970) and *Cullman Broadcasting Co.*, 40 FCC 576 (1963). A democracy depends on an informed public, and broadcasting plays the key role today in providing such information.

By incorporating this subsection, the Committee is ensuring that core policies implementing the Fairness Doctrine be preserved. This will permit the inclusion of results from the pending Congressionally mandated study on alternative means of administering and enforcing the Fairness Doctrine, although it will not permit the adoption of any alternatives that, in effect, nullify or weaken the doctrine. The Committee notes that the Congress did not intend that the Commission use the study to eliminate effectively the Fairness Doctrine. Instead, the study was to entertain alternative means of administration and enforcement that could preserve the doctrine while lessening any undue burdens. The Committee is very concerned that what the Commission has raised in its *Notice* proposals would not be within this Congressional direction. Adoption of these proposals would not be permitted by subsection (a)(2). At the same time, the Chairman of the Subcommittee has stated at the Committee meeting to report this legislation that he would promptly hold a hearing on such far-reaching alternative means of administration and enforcement and move to enact legislation if those are shown to be in the public interest. The Committee strongly believes this process will permit the important Fairness Doctrine obligations to be preserved, allow the Commission some discretion to alter or adopt new rules and policies to meet new events, and provide the opportunity for greater changes in rules and policies upon a decision by the Congress.

SECTION 4.—EFFECTIVE DATE

This legislation shall take effect upon the date of enactment.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following record votes during its consideration of S. 742:

On motion to report the bill favorably:

YEAS	NAYS
Mr. Hollings	Mr. Packwood
Mr. Inouye	Mr. Stevens
Mr. Ford	Mr. Kasten
Mr. Riegle [1]	Mr. McCain [1]
Mr. Exon	
Mr. Gore	
Mr. Rockefeller	
Mr. Bentsen	
Mr. Kerry [1]	
Mr. Adams	
Mr. Danforth	
Mr. Kassebaum [1]	
Mr. Pressler	
Mr. Trible	

[1] By proxy.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman).

The Communications Act of 1934

Section 315 of that Act

FACILITIES FOR CANDIDATES FOR PUBLIC OFFICE

Sec. 315. *(a)(1) A broadcast licensee shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*

(2) The enforcement and application of the requirement imposed by this subsection shall be consistent with the rules and policies of the Commission in effect on January 1, 1987.

[(a)] *(b)* If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such braodcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities indicental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

[(b)] *(c)* The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed—

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any time, the charges made for comparable use of such station by other users thereof.

[(c)] *(d)* For purposes of this section—

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

[(d)] *(e)* The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

ADDITIONAL VIEWS OF MR. PRESSLER

This legislation is but a clarification of the long-standing Congressional endorsement of the Fairness Doctrine, a cornerstone of broadcasting professionalism for many decades. Initially articulated by the FCC in 1949, the Fairness Doctrine was presumed by many to have been codified by Congress in 1959. It was not until the recent *TRAC* decision finding that Congress had "ratified" rather than "codified" the Doctrine that the need for this legislation became apparent. The Supreme Court's *Red Lion* decision has clearly established its constitutional legtimacy, and we are now simply restating in unequivocal statutory terms what I believe Congress intended to do nearly three decades ago.

I am not persuaded that the Fairness Doctrine imposes an undue burden on broadcasters. As former FCC Chairman, Charles Ferris, stated before this Committee, "[t]he Fairness Doctrine, reduced to its essentials, is little more than a statement of journalistic ethics." To be sure, it does impose a public interest obligation on broadcaster to present balanced views on often controversial issues. But this obligation is not unduly burdensome. It provides important guidance to those entrusted with a scarce resource, while allowing broad latitude in its implementation.

Given recent trends in the communications industry, the Fairness Doctrine had taken on a new significance. As Mr. Ferris notes, "[i]n this era of deregulation, it is the only remaining safety net left for the public interest standard and our society's expectations that broadcasters will serve as trustees for the public."

A recent practice which is gaining increased popularity in the smaller markets provides one example of why I believe we need to codify the Fairness Doctrine. Many single issue special interest groups have found it very effective to go into small, relatively inexpensive markets to buy air time in an attempt to influence public opinion in their favor. This, in itself, is not necessarily bad. The problem is that these commercial adverstisements are often crafted to appear as news reports, and present the "facts" in a very misleading manner. In addition, groups or individuals with varying viewpoints often have no means of responding if they are not as well financed or organized. The Fairness Doctrine is the only means available to guarantee a balanced response. This is a clear illustration of the "safety net" to which Mr. Ferris referred.

States with smaller markets are particularly susceptible to this type of practice because of a single issue group's ability to blanket the State or targeted area at a relatively low cost. Without the Fairness Doctrine, they are emboldened—indeed, even encouraged—to distort the facts on complicated national issues, and present them in a very misleading manner. Opposing groups or individuals often cannot afford to respond by purchasing comercial air time. Many broadcasters in these areas do not maintain nation-

al affilates to cover the issue adequately in their regular news stories, so they escape worry on that front as well. This type of practice serves no public interest. Indeed, it does a disservice to the American public.

There are exceptions to this scenario. One that particularly stands out in my state is KELO TV and radio of Midcontinent Broadcasting Company in Sioux Falls, SD. KELO exemplifies the high standard of "journalistic efforts" referred to by Mr. Ferris in his Committee testimony. It has consistently provided full and balanced reporting on both local and national issues of importance to my State, and goes the extra mile by utilizing national affiliate reporters to cover issues in places where it is impossible for them to maintain a permanent presence. If there were more KELOs in the business, I would feel much more comfortable in taking a different position on issues such as this. But it is an unfortunate fact of business life that not all broadcasters can or will operate with the same degree of professional public service responsibility as KELO. Economic pressures encourage a preference for requiring a commercial response to one-sided representations of the issues rather than providing for fuller access to responding viewpoints on local issues. Some stations cannot afford or will not spend the money for a national affilate to cover both sides of controversial national issues.

Opponents of the Doctrine argue that it has a "chilling effect" on broadcasters' desire to cover controversial issues. Doubtless, the requirements of the Fairness Doctrine may weight into broadcaster's decisions on airing controversial issues. But under some circumstances, such as the problem I outlined above, I believe it should. If the issue is presented fairly, the Doctrine imposes no additional burdens on responsible broadcasters. If it is not, it does the viewers a greater injustice to present a distorted view of the issues, and runs the risk of putting even more power in the hands of well financed single issue groups.

Contrary to arguments raised by the Doctrine's opponents, this approach does not violate the letter or spirit of the first amendment. The Supreme Court's *Red Lion* decision has resolved that issue. Broadcasting is the dominant media in today's society. Newspapers and other media do not supply an effective counter-balance to the power—particularly in rural America. For example, as pointed out in Mr. Ferris' testimony, "65 percent of the public [rely on] televison as the source of most of their news, while 40 percent rely exclusively on television for news." The airwaves comprise a scarce resource which is and must continue to be allocated based upon a public interest standard. The Fairness Doctrine is the cornerstone of that standard, and should not be repealed until industry changes or technological advancements negate the need for its existence. We have not yet reached that point.

LARRY PRESSLER.

MINORITY VIEWS OF MR. PACKWOOD

I strongly oppose S. 742, the Fairness in Broadcasting Act, because it is not fair to broadcast journalists or to the public that they serve. As Chairman of this Committee, I held six hearings on the Fairness Doctrine, three in 1982 and three in 1984. During those hearings, the Committee heard from more than 50 witnesses on both sides of the issue. We heard scientists and engineers declare that the electromagnetic spectrum is no longer scarce; we can create many more broadcast outlets than we certainly have. We heard constitutional scholars discuss the blurring of print and electronic media; they insisted that government content controls pose a very real danger to electronically delivered newspapers, teletext, videotex, and various satellite technologies. We also heard small local broadcasters make unmistakably clear that the Fairness Doctrine chills the exercise of first amendment rights by discouraging the coverage of controversial issues.

With all due respect for my colleagues on this Committee, the one hearing held by the Communications Subcommittee on S. 742 did little to tip the scales in favor of the Fairness Doctrine. In fact, anyone who examines the entire record, which includes the FCC's 1985 Fairness Doctrine Report as submitted by the chairman of the FCC, Mark Fowler, would have to conclude that the majority has failed to satisfy the strict burden of proof mandated by the Constitution for legislative acts that implicate cherished first amendment rights. The stunning fact is that the evidence supports repealing the Fairness Doctrine. It does not support codifying it.

The questions posed by S. 742 are basic to democracy and civil liberties in this country. Those liberties can be traced back to the Magna Carta and the English Bill of Rights. The founders of our country did not want to entrust those liberties to the whims of a minority or to the Federal Government. So our founders protected them by writing them into our Constitution. In 1791, our founders added the first amendment to the Constitution to ensure the freedom of speech and press.

Even with the first amendment firmly in place, history has taught us that the government will try to abuse our liberties. In 1798, Congress passed the Alien and Sedition Acts severely limiting a citizen's ability to speak out and criticize his or her government. Editors, publishers, and even a Congressman were jailed under these laws. Following the Civil War, the Radical Republicans in Congress put the South under military rule for a decade suspending many civil liberties. From 1950 to 1954, Senator Joe McCarthy ran roughshod over the liberties of artists, teachers, politicians, and publishers.

The abuse of our liberties can also come from the executive branch, and from the President himself. In 1920, Woodrow Wilson's Attorney General, A. Mitchell Palmer, instigated the famous

"Palmer red raids" in which thousands of so-called anarchists and Communists were jailed with little regard for their constitutional rights. In 1942, Franklin Roosevelt, a man honored for his defense of civil liberties, made the decision to put native-born Americans of Japanese ancestry into "detention" camps, totally violating their civil liberties. Unfortunately, even the Supreme Court, caught up in war fever, confirmed the President's right to abrogate those individual liberties. If left unchecked by the right of citizens to express dissatisfaction, and that of the press to openly criticize the wanton abuse of civil liberties, these actions taken by Presidents, the Congress and even the Supreme Court would have undermined the very foundations of our Republic.

Historically and traditionally, the press, which includes print and electronic media, has played an important role in saving the Republic from these autocratic forces. It is a watchdog over the abuses of government. The printed press exposed the evils of the Alien and Sedition Acts and fought for their repeal. It attacked those pursuing radical reconstruction and the impeachment of President Andrew Johnson. The electronic press through Edward R. Murrow's "See It Now" broadcast and the televised Army-McCarthy hearings unmasked the hideousness of McCarthyism. Murrow, I hasten to add, opposed the Fairness Doctrine. This Nation needs a strong and vigorous press, not one that is intimidated and suppressed by government content controls.

When the founders added the first amendment to the Constitution in 1791, they protected all forms of communications known at the time—speech and press. They did not consider scarcity a viable rationale for government restrictions. Despite the fact that there were only 8 daily newspapers—all of them highly partisan—in the entire United States, the founders chose to protect them. Scarcity was irrelevant.

The underlying rationale for broadcast regulation, however, is exactly what the founders chose to ignore, namely the supposed scarcity of outlets. It would serve very little purpose to debate whether the scarcity rationale was valid when the Communications Act was passed in 1934. The question now posed by S. 742 is whether Congress will recognize the profound and fundamental changes in the communications marketplace and extend full first amendment rights to the electronic media, or choose to ignore these developments and continue to restrict broadcast speech with government content controls that were conceived during broadcasting's infancy.

Unfortunately, the majority has chosen to ignore these developments. It has chosen to ignore the testimony of spectrum scientists and engineers that there is no scarcity. In 1984, for example, Dr. Robert Powers, the Chief Scientist at the FCC, a career civil servant, told this Committee: "There is no inherent shortage of spectrum capacity from a technological point of view." He also said that by taking one UHF frequency in Washington, we could add an additional 95 to 100 quality radio signals to the market. At the latest hearing, Dr. Craig R. Smith, President of the Freedom of Expression Foundation, testified that "[w]hen the scarcity rationale was first articulated by the Supreme Court in 1943, there were less than a thousand AM radio stations in the entire United States."

Today, there are over 10,000 radio stations and almost 1,300 television stations. Dr. Smith added: "Over 96 percent of television households receive five or more television signals, more than 71 percent of U.S. TV households receive nine or more television stations." The marketplace is also strengthened by the addition of 7,300 operating cable systems that reach almost 39 million subscribers in the United States.

One of the broadcasters appearing at the March 18, 1987 hearing on S. 742, Tom Elkins, President and General Manager, KNUI-AM/KHUI-FM, Hawaii, added to this portrait of a diverse and abundant communications marketplace. Elkins stated:

> We have more than four dozen radio stations, with room for more, and many are heard throughout the islands. We have 16 licensed television stations, and could more than double that number * * * That fact is, anyone who can figure out how to get it on the air and keep it running can probably have a broadcast station in Hawaii.

As Mr. Elkins' testimony confirms, as in many other markets, there is no scarcity of outlets in Hawaii. Indeed, there are substantially more frequencies available than there are people who want them. Clearly, those favoring this legislation have confused economic viability with scarcity of outlets.

The FCC, which has long been recognized by the Congress and the courts as the expert agency in the area of communications technology, examined the question of spectrum scarcity in its 1985 Fairness Doctrine Report (102 F.C.C. 2d 145). After carefully surveying the present media marketplace, the FCC concluded: "[T]he growth of traditional broadcast facilities, as well as the development of new electronic information technologies, provides the public with suitable access to the marketplace of ideas so as to render the fairness doctrine unnecessary." (102 F.C.C. 2d at 197). The Report added: "On the record before us, we cannot find that there are a insufficient number of voices in local markets to warrant continuation of the fairness doctrine." (102 F.C.C. 2d at 219).

Broadcast outlets greatly outnumber daily newspapers in this country. Yet the majority of members of this Committee feel that we must continue to treat broadcast media differently because it is "scarce." I think the decision by Judge Bork in the *Telecommunications Research and Action Center* case, exposes this policy for what it really is—inconsistent, illogical, and unpersuasive. As Judge Bork stated: "[S]carcity is a universal fact, it can hardly explain regulation in one context and not another."

Reviewing the testimony of spectrum engineers and scientists in 1984, the present composition of the media marketplace, the observations of Judge Bork in the *TRAC* case, and the findings and conclusions of the FCC's Fairness Report, makes it perfectly clear that the electronic media cannot and should not be treated as scarce. Without the scarcity rationale, the Fairness Doctrine and all the other content controls imposed on the electronic media must fall.

The second major issue raised by S. 742 is whether to recognize the testimony of broadcast journalists, the Chairman of the FCC, and others who have presented undeniable proof that the enforcement of the Fairness Doctrine has a chilling effect on broadcast

speech, or to ignore the evidence and continue to stifle the free flow of ideas. Unfortunately, the majority has once again chosen to ignore the evidence; evidence which the Supreme Court has said would be sufficient to justify a re-examination of its 1969 *Red Lion* decision. (See: *FCC* v. *League of Women Voters of California,* 104 S. Ct. 3106, 3116 n.11 (1986)).

The majority has chosen to ignore the testimony of small local broadcasters who came before this Committee in February 1984 and recounted episodes of harassment fostered by the Fairness Doctrine. Ray Saadi, a radio broadcaster in Houma, LA, told this Committee how his station was victimized by a group demanding time to reply to a radio commentary program hosted by Ronald Reagan. Saadi recounted that his station expended "a lot of time, a lot of effort, and . . . money" dealing with his complaint. Even though he felt the station's coverage was fair, Saadi "caved in" and gave away the time. Saadi told this committee:

> We do not have as small broadcasters, the resources, and time, people and finances to deal with fairness complaints from groups and individuals who are not our listeners, not in our listening audience, and are miles away.

This Committee also heard in 1984 from broadcasters in New Jersey, Washington, Wisconsin, and Florida who recalled similar episodes. At the March 1987 hearing on S. 742, we heard from John Spain, News Director at WBRZ-TV in Baton Rouge, LA, on the chilling effect of the Fairness Doctrine. Mr. Spain told this Committee how a "small but vocal group" complained that WBRZ-TV had not presented their point of view on the question of nuclear energy. Spain recalled that the issue was very important to the local community, and that his news department devoted significant time to careful analysis in news coverage and documentaries. Despite the balance provided by WBRZ-TV, one local group threatened the station saying that if their demands for time weren't met, a "complaint would be filed with the FCC under the fairness doctrine." Spain said his news department spent 45 days pulling together the information to defend WBRZ-TV's coverage. During that time, coverage of the nuclear issued was stopped, and speech on an important public issue was chilled. Spain added that "[a]fter we laid the documentation before them, they agreed that we had been fair. And we resumed our coverage."

These examples of the chilling effect cannot be ignored by this Committee. They represent what has been tacitly accepted as the environment in which broadcasters must operate. The chilling effect forces broadcasters, especially small local broadcasters, to play it safe and avoid controversial issues. Although it's reassuring to know that Westinghouse Broadcasting Company has no problem with the policy promoted by the Fairness Doctrine, it is not representative of the majority of broadcasters who are not parts of major media conglomerates. Indeed, Tom Goodgame, who testified on behalf of Westinghouse, did recognize that Fairness Doctrine enforcement "could become too intrusive on day-to-day editorial and program judgments," and recommended that the doctrine no longer be applied on a case-by-case basis.

In addition to the testimony received by this Committee, the FCC's 1985 Fairness Doctrine Report contains a substantial amount of evidence on the chilling effect of the Fairness Doctrine. The FCC's Report found that there are substantial burdens associated with the doctrine. It found that broadcasters fear the government sanctions inherent in fairness enforcement, which includes the possibility of loss of license. The Report also revealed that many broadcasters are inhibited from carrying controversial material by the high costs of Fairness Doctrine litigation. These costs are prohibitively expensive, especially for small stations, where even frivolous complaints pose serious problems. The Report also detailed instances in which a group or organization used the doctrine to harass and intimidate broadcasters with the aim of either suppressing speech or forcing their speech on others.

The FCC's Report concluded that "the record demonstrates that the fairness doctrine causes broadcasters to restrict their coverage of controversial issues." (102 F.C.C. 2d at 169). Moreover, it stated: "The record reflects * * * that the intrusion by government into the editorial decisions of broadcast journalists occasioned by fairness doctrine requirements overall lessens the flow of diverse viewpoints to the public to the detriment of the broadcasters and the public to the detriment of the broadcasters and the public alike." (102 F.C.C. 2d at 171). In the agency's expert opinion, it found "that the evidence, derived from the record as a whole, leads us to conclude that the fairness doctrine chills speech." (102 F.C.C. 2d at 187).

Another issue raised by S. 742 involves the application of the Fairness Doctrine to cable television. In its hearing on S. 742, the Committee did not hear from experts in the cable field, and it did not discuss the applicability of the bill to this technology. It is my understanding that the intent of the Committee in passing this bill is to apply the doctrine to cable origination programming. While I find the arguments in favor of applying the Fairness Doctrine to traditional broadcasters unconvincing, there is no basis for applying the doctrine to cable television or to other cable technologies, which do not even utilize the supposedly scarce airwaves. The proponents of this bill would be hard-pressed to argue otherwise. By including cable television in the scope of this bill, I believe the Committee does an even greater disservice to the public by further restricting the first amendment rights of the electronic media and impeding the development of technologies which greatly expand the marketplace of ideas.

After reviewing the evidence gathered by this Committee in 1982, 1984, and 1987, and the FCC in its 1985 Fairness Doctrine Report, it is clear that far from furthering the discussion of public issues, the Fairness Doctrine actually inhibits broadcasters from presenting controversial issues of public importance. The doctrine has an unconstitutional chilling effect on speech.

I feel very strongly that the majority, by ignoring the evidence that scarcity no longer exists and that the doctrine has a chilling effect, is endorsing an unconstitutional act, which if it does become law, will ultimately be overturned by the courts as violating the first amendment. I would prefer that it was Congress that corrected this situation by rejecting S. 742 and repealing the Fairness Doc-

trine. Thankfully, in this country the federal judiciary is given the power to interpret the Constitution, (*Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803)), and thereby, the authority to protect the first amendment rights of all communicators.

If this Committee's hearings have taught me anything, it is that both the far left and the far right want very much to continue federal control of the content of the electronic media. Content control allows them to use the media to further their objectives. And they see nothing wrong with expanding the government's content doctrines to cover not just broadcasting, but newspapers, data transmissions, satellite communications and other vital sources of information. That's why I believe S. 742 is a betrayal of the spirit and intent of our founders.

The real danger to our liberties arises when these groups achieve political power. As I have stated before, and as the Chairman of the FCC, Mark Fowler, warned at the last hearing, those who control the government can control the flow and content of the information that is communicated electronically. When It comes down to a choice between speech that is regulated by a government agency or the dictates of the minds and hearts of the public at-large, the choice is a simple one for me to make.

BOB PACKWOOD.

APPENDIX 1

Mr. PASTORE. Mr. President, I want to say at the outset that I am not afraid of free speech, I am not afraid of the first amendment of the Constitution, no more than I am afraid of the big bad wolf.

Mr. President, I bow to no one including the Senator from Wisconsin, when it comes to defending the first amendment of our Constitution—its origin—its purpose—and its sanctity.

Anyone who reads the speech that I made before the Associated Press Broadcasters from beginning to the end will understand that I was, in fact, defending the Constitution by pointing up the responsibility that an electronic journalist has in carrying out his obligations to the public. That is the reason why I said,

> Absent truth and there is really no justification for a free press.

Now, what does that mean? When you begin to tell the people a bunch of lies, you prostitute and debauch freedom of the press, and even my 9-year-old grandson understands what I mean.

My colleague asserts my interpretation of the responsibility of a free press is wrong. After 40 years of public life, that is news to me

I respectfully suggest he has failed to understand the thrust of my speech in its entirety and has interpreted parts of it out of context.

The point I made is exactly the opposite of what Senator Proxmire claims it to be.

Again I say I yield to no man in my regard for the first amendment and its safeguards, and I will defend it with my life.

Over 50 years ago, Mr. Justice Holmes, in *Abrams* v. *United States* (250 U.S. 616, 630 (1919) said:

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, *and that truth is the only ground upon which their wishes safely can be carried out.* [Emphasis added] That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

May I say to my colleague, if I have misinterpreted the Constitution, I am in rather distinguished company, I am in the company of Justice Holmes.

Before discussing the substance of the fairness doctrine, I respectfully submit certain factually and legally inaccurate statements which Senator Proxmire made should be corrected. I intend

no malice when I say this, but the doctrine to the doctrine stems from the fact it is so misquoted and so misunderstood.

I really believe a good deal of objection to the doctrine stems from the fact it is so misquoted and so misunderstood.

As chairman of the Subcommittee on Communications for 20 years, I can make some modest claim to familiarity with it, however. It is in this spirit I would like to undertake to set the record straight.

When the Senator says the fairness doctrine has its genesis in section 315, he is, I regret to say, absolutely wrong—wrong as a matter of history and of law. To the contrary, the FCC's first general statement on the "fairness doctrine" was set forth in the "Editorializing Report of 1949." There are some who maintain the doctrine was in the law before that date. Had the Senator contacted my office before drafting his remarks, I would have been pleased to furnish him with a copy of a committee staff study on the fairness doctrine done in 1968.

That study sets out the history of the doctrine and explains it quite thoroughly. At this point I ask unanimous consent to insert an excerpt from that study in the Record which, I believe, accurately and fully sets out the history of the fairness doctrine.

There being no objection, the staff study was ordered to be printed in the Record, as follows:

Excerpt From Staff Study Report

its origin and development

1. Mayflower antecedents

A significant body of opinion holds this "fairness doctrine" had its origin in the Commission's "Editorializing Report of 1949." Words of art which became the standard for articulation of the doctrine were, for the most part, first expressed there. Yet, there is every suggestion the doctrine was born long before 1949; that it was a necessary incident to "the public interests, convenience or necessity" from the very beginning.

To understand the historical development of regulated fairness and to appreciate many of the continuing problems it evokes, a recognition of two types of broadcast opinion is required. One is the opinion of the licensee, identified as such at the time of broadcast, and ordinarily called "licensee editorializing." The other is broadcast opinion expressed by those other than the licensee and not necessarily reflecting his views. It will also be helpful to recognize two types of issues which may arouse controversy. They may be characterized as "private issues" on the one hand and "public issues" on the other.

Private issues include contract disputes, boundary disputes, domestic squabbles, personality conflicts, et cetera. They generally polarize between two sides with *opposing* points of view. It is not uncommon for civil litigation to develop from them. In a more romatic area they sometimes spawned duels to the death. Although the grist of gossip, unless one or more of the adversaries is a public agency or has a high degree of notoriety, their content seldom intrudes upon the organized channels of public communication.

Public issues are drawn upon the abrasive interface separating various interests congealed by the democratic processes of our society. Sometimes points of view upon these issues bipolarize. More frequently, a variety of interests are involved whose *various* viewpoints span a spectrum of multiple alternatives. The struggles which ensue are generally fought in the ballot box and before the councils of men. Although their resolution may generate byproducts private issues (personality conflicts, domestic squabbles, et cetera), they are essentially public in character. The worthy subjects of journalist reportage and public debate, these are the matters about which "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * *."

Very early in the history of broadcasting regulation, the Federal Radio Commission recognized the importance of discussing public issues over the airwaves and the constitutional freedom to do so. In its annual report of 1928, it said:

> It is self-evident that the constitutional guarantee of freedom of speech applies to the expression of political and religious opinions, to discussions, fair comments, and criticisms *on matters of general public interest,* of candidates, of men holding public office, and of political, social, and economical issues. At no time has the Commission considered that it had the right to chastise a station for its conduct in handling such matters if the station has observed the requirement of the law that it give rival candidates equal opportunities to use its microphone. [Emphasis supplied.]

But, the exercise of free speech by broadcasters was not without limits. The 1928 report continues:

> Does the same constitutional guarantee apply to the airing of a *private* matter? The history of the guarantee shows that it was the outgrowth of a long struggle for the right of free expression on matters of *public* interest. Two neighbors may indulge in any verbal dispute they please in their own back yards where no one is within hearing distance. Let them try to conduct the same dispute in a public place * * * and they soon find they are not protected by the Constitution. [Emphasis supplied.]

Clearly the right to free expression was not intended to extend to broadcast of private issues. And the Commission had an opportunity in 1928 to apply this principle to a case in point, the matter of *WRAK*. Located in Erie, Pa., that station's owner and another local licensee were engaged in a personal controversy, using their broadcast facilities for abusive exchanges, each against the other. Acknowledging that it could not censor, but had to exercise concern for the public interest, the Commission, in considering the matter, stated:

> The Commission is not attempting to pass on the responsibility for a dispute; it may rest with one station or the other * * * The Commission, however, is certain that whoever may be to blame, it is not in the public interest, convenience, or necessity to permit these two broadcasters

> further to regale the inhabitants of Erie with their personal differences.

Later in 1928, deciding the matter of WCOT, the Commission expanded its prohibition against the private use of a station as opposed to its operation in the public interest. There the Commission said:

> * * * it is manifest that the station is one which is operated without regard to the rendering of any real public service in the field of radio broadcasting and in such a manner as must be objectionable to the large mass of the listening public and exists *chiefly for the purpose of serving the private interests of the applicant and as a conveyance for his personal views.* [Emphasis supplied.]

Here the Commission forbids use of a broadcast outlet *chiefly* for private interests and conveyance of personal views of the licensee. Not limited to broadcast of private issues, this prohibition extends to primary use of the station for conveyance of licensee's personal views, whether on issues public or private. Although no mention is made of presenting opposing views, implicitly this was not done and the lack of balance invoked Commission ire.

Subsequently, on August 22, 1928, the license of WEVD in New York City was renewed. Here the question of using a station by licensee for expressing private views on public issues was involved. And here, as applied to a case in point, the infant "fairness doctrine" was probably born. The Commission said:

> The Commission will not draw the line on any station doing an altruistic work, or which is the mouthpiece of a substantial political or religious minority. Such a station must, of course, comply with the requirements of the law and *must be conducted with due regard for the opinions of others* * * *. [Emphasis supplied.]

Private opinions on public issues could be discussed by licensee, but only "with due regard for the opinions of others * * *." The licensee's right to express his opinion on *public issues* was limited by a responsibility to broadcast the opinions of others. But, in no event, could *private issues* enter broadcast content.

The *WRAK, WCOT,* and *WEVD* cases stimulated little reaction in the industry. Yet they established a regulatory philosophy upon which the fledgling FRC would draw its "Principles Underlying the Evaluation of Broadcasting Stations." Those principles were announced in the *Great Lakes* decision of 1929, and were merely incidental to disposition of the matter involved. Nevertheless, it is noteworthy that the Commission there said:

> Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interest of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this . . .
>
> In such a scheme there is no room for the operation of broadcasting stations exclusively by, or in the private in-

> terests of, individuals or groups so far as the nature of the program is concerned. * * *
>
> Insofar as a program consists of discussions of public questions, *public interest requires ample play for the free and fair competition of opposing views and the Commission believes that the principle applies * * * to all discussions of issues of importance to the public.* [Emphasis supplied.]

The phrase "due regard for the opinion of others" from *WEVD* evolved in *Great Lakes* to an affirmative responsibility strikingly similar in language to the present day "fairness doctrine." The "public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies * * * to all discussions of issues of importance to the public."

Thereafter, in the spate of license revocations for what essentially were fairness and personal use violations, the Commission, in the next few years, exercised a regulatory muscle which it has yet to flex again against broadcast content. Among those revocations were the notorious *Brinkley, Shaeffer,* and *Shuler* cases.

Dr. John R. Brinkley, operator of KFBK, used his broadcast facility as an integral part of two other ventures, his Brinkley Hospital and Brinkley Pharmaceutical Association. The hospital, which specialized in a radical operation guaranteed by the good doctor to rejuvenate masculine virility, advertised extensively over the station. The Brinkley Pharmaceutical Association was a combine of druggists who sold special prescriptions concocted by Dr. Brinkley. For three 30-minute broadcast periods each day the doctor appeared personally over the station. During these programs, he would read letters mailed by listeners describing their various physical ailments and, without any personal examination, prescribe remedies for those ailments. Needless to say, those remedies invariably entailed prescription of Dr. Brinkley's special concoctions, designated by number and available at participating pharmacies. In turn, member druggists remitted a fixed percentage of their gross sales of Brinkley tonics to KFBK in lieu of a fixed charge for the doctor's broadcast time. By far the greater volume of the station's income was derived from those royalties and advertisements for Brinkley Hospital.

As might be expected, these practices did not go unnoticed by organized medicine and great public furor ensued. In view of the many complaints, the station's application for license renewal was set for hearing. The Commission determined that renewal of the license was not in the public interest, convenience or necessity; finding that the practice of prescribing medical treatment over the air without physical examination was inimical to the public interest and that Dr. Brinkley had operated the station for his own private purposes. Dr. Brinkley appealed the Commission's ruling to the U.S. Court of Appeals for the District of Columbia.

In upholding the Commission's action, the court determined that the business of broadcasting, as a species of interstate commerce, is subject to reasonable regulation by Congress and its arm, the Federal Radio Commission. The court then reasoned:

> * * * When Congress provided that the question whether the license should be issued or renewed should be dependent upon a finding of public interest, convenience or necessity, it very evidently had in mind that broadcasting should not be a mere adjunct of a particular business, but should be of a public character. Obviously there is no room in the broadcast band for every business or school of thought.[4]

For the first time, the Court of Appeals agreed that a broadcast license could not be used for a private purpose.

The *Shaeffer* case [5] was decided by the Commission in 1930. It is of particular note for two reasons. It is probably the harbinger of the personal attack feature of the doctrine and it involved opinion and utterances of a person other than licensee. The broadcast content which resulted in license revocation was generated by one Robert G. Duncan who purchased time from the licensee, Shaeffer, for his broadcasts. Shaeffer, in fact, claimed to disapprove of the content of Duncan's programs, but contended he was bound to carry them because of a lease arrangement with Duncan for broadcast time.

In its 1930 decision, while disposing of Shaeffer's contention, the Commission announced the principle which was to define licensee responsibility thereafter. The licensee, himself, must assume full responsibility for all broadcast content emanating from his station and he must, therefore, retain full authority over all program content. Discussing the offending content, the Commission said:

> * * * The compelling factor in the Commission's decision * * * was the nature of the broadcasts which have been emanating from this station * * * This disclosed that as a result of a very bitter political campaign the defeated candidate, one Robert G. Duncan, had entered on a program of vilification denouncing in most violent terms those whom he believed responsible for his defeat.

There was no showing that those attacked by Duncan were afforded an opportunity to respond nor does the Commission speculate that the result would differ had such been the case. The Commission simply determined that these personal attacks were not in the public interest, convenience, or necessity, even though the offending party was not the licensee himself.

The renewal of station KGEF [6] was involved in the *Shuler* case. Although Trinity Methodist Church was the nominal licensee, the station was actually operated and controlled by Robert P. Shuler, the church's pastor. He was the principal spokesman over the station, frequently taking positions on controversial issues of a public nature and launching personal attacks upon public officials, the courts, and other individuals and groups. He was wont to severely criticize the Catholic Church and disparage Jews. It was not infrequent that his allegations and disparagements had no basis in fact.[7]

Footnotes at end.

After hearing, the Commission decided not to renew the license, and stated:

> The Commission holds no brief for any parties subjected to attacks through the medium of station KGEF, but in almost every instance appearing on the record the attacks made by Shuler, and the methods employed therefor, are certainly not in the interests of the public or the rendition of a commendable broadcasting service. *The broadcasts of this party are filled with misstatements of fact and insinuations based thereon* * * * Surely, the case, in such a manner, of one of the most powerful mediums of furnishing instruction and entertainment to the public does not meet the statutory standard upon which the right to hold a license must be based. While the Commission does not have the power of censorship, it does have the duty of determining whether the standard fixed by law has been or will be met by the use of a broadcast license. [Emphasis supplied.]

As in the *Shaeffer* case, no mention is made of affording those attacked an opportunity to respond. Clearly Shuler did not do so.

While, as in *Shaeffer,* the Commission determined the involved personal attacks were not in the public interest, it developed a new standard for dealing with broadcast content. It condemned broadcasts "filled with misstatements of fact and insinuations based thereon." The broadcast of opinion per se was not condemned, only opinion based upon misstatement of fact.

From an appeal taken by Shuler, the U.S. Court of Appeals for the District of Columbia had another opportunity to review FRC action directed at the regulation of broadcast content.[8] Upholding the Commission's action, the court said:

> If it be considered that one in possession of a permit to broadcast in interstate commerce may, without let or hindrance from any source, use these facilities, reaching out, as they do, from one corner of the country to the other, to obstruct the administration of justice, offend the religious susceptabilities of thousands, inspire political distrust and civic discord, or offend youth and innocence by the free use of words suggestive of sexual immorality, and be answerable for slander only at the instance of the one offended, then this great science, instead of a boon, will become a scourge, and the Nation a theater for the display of individual passions and the collisions of personal interests. This is neither censorship nor previous restraint, nor is it a whittling away of the rights guaranteed by the first amendment, or an impairment of their free exercise. Appellant may continue to indulge his structures upon the characters of men in public office. He may just as freely as ever criticize religious practices of which he does not approve. He may even indulge private malice or personal slander—subject, of course, to be required to answer for the abuse thereof—but he may not, as we think, demand, of right, the continued use of an instrumentality of com-

> merce for those purposes, or any other, except in subordination to all reasonable rules and regulations Congress, acting through the Commission, may prescribe.

The Court continued, while assessing the reasonableness of the Commission's action:

> However inspired Dr. Shuler may have been by what he regarded as patriotic zeal, however sincere in denouncing conditions he did not approve, it is manifest, we think, that it is not narrowing the ordinary conception of "public interest" in declaring his broadcasts—without facts to sustain or to justify them—not within that term, and, since that is the test the Commission is required to apply, we think it was its duty in considering the application for renewal to take notice of appellant's conduct in his previous use of the permit, and, we think, was neither arbitrary nor capricious.

In the *Shuler* decision, the court clearly confirms the Commission's right, even duty, to consider past broadcast content upon application for renewal as long as the standards applied are reasonable. Here, a standard which condemns broadcasts containing misstatement of fact and insinuations based thereon was held, by the court, to be reasonable.

Summarizing, the Commission determined in "Brinkley," "Shaeffer," and "Shuler" that the broadcast license could not be used for a private purpose, that personal attacks of a certain type over the broadcast medium are not in the public interest, and that personal attacks and opinions based upon misstatement of fact, along with insinuations based thereon, are not worthy subjects of broadcasting. The Court of Appeals for the District of Columbia supported the Commission action and recognized the Commission's duty to consider the nature of past program content in weighing renewal. Only negative aspects of an infant "fairness doctrine" are implicit in these cases. One can only speculate what the outcome would have been had Brinkley, Shaeffer, and Shuler afforded balance of viewpoints and opportunities for response in their overall broadcast content. It is probably fair to surmise that Brinkley and Shuler would have lost nevertheless since one was based upon private use of the facility and the other upon broadcasts containing misstatement of fact.

However, Shaeffer would probably have fared better had balance been incorporated in his programing to offset the views of Duncan and afford a voice to those attacked by him. This speculation is based upon the result in the *WEVD* case and the principles set out in "Great Lakes." Another case decided prior to "Shaeffer" lends credence to the speculation.

In October 1928, the Chicago Federation of Labor, licensee of WCFL, filed an application before FRC to change its frequency to a clear channel and to broadcast 24 hours per day. Theretofore WCFL has been a low power station authorized to broadcast on another frequency during daylight hours only. The clear channel sought by WCFL had previously been assigned to stations WBBM, Chicago, and KFAB, Lincoln, Nebr., one operating four-sevenths of

the time and the other three-sevenths. Granting of the WCFL application would have forced both WBBM and KFAB off the air or onto other frequencies. The application was denied by the Commission on the basis that WBBM and KFAB would continue to afford a better quality public service than that proposed by WCFL for the clear channel. In its decision, the Commission took into account the past practices of WBBM and KFAB in furnishing equal treatment to all segments of their community. Chicago Federation of Labor appealed the decision and the Court of Appeals for the District of Columbia upheld the Commission. While discussing WBBM's past record, the court said:

> It began broadcasting in November 1923, and has in all respects and at all times scrupulously obeyed the law and rules governing broadcasting. It has always rendered and continues to render admirable public service. *The station has consistently furnished equal broadcasting facilities to all classes in the community,* and has won the favor and esteem of the public. Its commendable career entitles it to consideration. The career of station KFAB is equally meritorious.[9] [Emphasis supplied.]

Here, *equal facilities* for *all classes* in the community is emphasized. The Court's decision in 1930 approves a standard of fairness not dissimilar to the "fairness doctrine" as known today.[10]

Ten years later, in 1938, the Commission had before it the application of Young Peoples Association for the Propagation of the Gospel seeking a construction permit. The application for a new station was denied because of an association policy not to permit the use of its facilities by persons or organizations whose views differed from those of the applicant. While denying the application, the Commission reasoned:

> The facilities of the station are to be used primarily for the dissemination of religious programs to advance the fundamentalist interpretation of the Bible. The applicant stated, however, that in connection with religious broadcasts the station's facilities would be extended only to those whose tenets and beliefs in the interpretation of the Bible coincide with those of the applicant * * * Where the facilities of a station are devoted primarily to one purpose and the station serves as a mouthpiece for a definite group or organization it cannot be said to be serving the general public. That being the case, if one group or organization is entitled to a station facility for the dissemination of its principles, then other associations of equal magnitude would be entitled to station licenses on the same grounds.[11]

Applicants refusal to broadcast various point of view is the singular reason given for denying the permit. Obviously the "fairness doctrine" in at least skeletal form was very much alive in 1938 as before.

With this background, let us proceed to the *Mayflower* case.

2. Mayflower to 1949

Without question, no other FCC decision affecting broadcasts has aroused as much controversey, stimulated as much industry reaction, or generated as much comment as the so-called *Mayflower* decision issued January 17, 1,941.

The Yankee Network, Inc., was licensee of two broadcast outlets located in Boston, Mass., stations WAAB and WNAC. Starting early in 1937, both stations adopted a policy of broadcasting licensee editorials. Through that vehicle, station management advocated election of verious political candidates and took positions upon a number of controversial public issues.

On March 31, 1938, one Lawrence J. Flynn, a former employee of the Yankee Network, Inc., forwarded a petition to FCC requesting a hearing upon the renewal application of WAAB. He based his criticism of the station upon the editorial practices of management. Supporting his argument, he accompanied his petition with recordings of editorials and political speeches allegedly delivered by an employee of the licensee over both stations WAAB and WNAC.

After an exchange between the Commission and the licensee concerning Flynn's charges, the renewal applications of both stations were designated for hearing (one by notice dated July 19, 1938, and the other by notice dated September 15, 1938). By February 22, 1939, neither of the renewals had proceeded to hearing and Flynn wrote the Commission withdrawing his petition and the evidence upon which it was based. In the meantime, both stations had not broadcast any editorials since March of 1938.

On March 23, 1939, Mayflower Broadcasting Corp., filed application for construction of a new broadcasting station in Boston and requested for it the frequency being used by WASB. One of the shareholders of Mayflower was the same Lawrence J. Flynn. Since Mayflower's application (docket 5618), and WAAB's most recent renewal application (docket 5640), requested the same frequency, both were designated for simultaneous hearing.

After hearings in November of 1939, the Commission, on May 31, 1940, released its proposed findings and conclusions on both applications. It proposed to dismiss the application of Mayflower because of lack of financial qualification and to renew the license of WAAB. Here no mention of WAAB's editorial practices were found, and the Commission justified its proposed action with the following language:

> The primary reason for designating the renewal application of station WAAB for hearing was the pendency of the application of the Mayflower Broadcasting Corp., requesting the facilities allocated to said station. In view of the conclusions which we have reached with respect to the Mayflower Broadcasting Corp's application we do not consider it necessary to discuss other evidence introduced at this hearing. Much of this evidence concerns information brought before the Commission and which was the subject of its review upon the complaint of Lawrence J. Flynn, one of the stockholders of the Mayflower Broadcasting Corp.

Had the matter been left to lie at this point, no special notoriety would ever have been gained by the struggle between Mayflower and WAAB.

But, alas, on June 20, 1940, Mayflower took exception to the proposed findings and conclusions and requested oral argument. Objecting to 15 aspects of the proposed findings and conclusions. Mayflower raised again the problem of editorializing by WAAB. Oral argument was heard on July 25, 1940, without a quorum of Commissioners. In the course of that argument, counsel for WAAB was pressed by the Commissioners present for an assurance that WAAB would carry no editorials in the future. The licensee thereafter filed affidavits stating it had discontinued editorials and had no present intention to resume them, although some ambiguity upon this point remained.

Since a quorum was not present during the July argument, Mayflower exercised its right to be heard by the Commission legally en banc. Reargument was heard on September 26, 1940, covering substantially the same ground as before. Finally, on January 17, 1941, the final order of the Commission was issued with a bombshell tucked neatly inside: "In brief, the broadcaster cannot be an advocate."

As in the proposed findings and conclusions, Mayflower's application for a construction permit was denied. The Commission found it lacked the requisite financial qualifications and that it had made misrepresentations of fact in its application. But, far broader than the earlier proposed findings and conclusions, the final order,[12] while renewing WAAB's license, also took up the matter of its editorial practices. Reflecting upon those practices, the Commission said:

> No attempt will be made there to analyze in detail the large number of broadcasts devoted to editorials. The material in the record has been carefully considered and compels the conclusion that this licensee, during the period in question, has revealed a serious misconception of its duties and functions under the law. Under the American system of broadcasting it is clear that responsibility for the conduct of a broadcast station must rest initially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of radio, *the public interest can never be served by a dedication of any broadcast facility to the support of his own partisan ends.* Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. *A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidates of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.* [Emphasis supplied.]

Debate continues to this day about the true meaning of those *italicized* sentences. Innumerable tracts, treaties, and articles have been written for their clarification. They range from an interpretation that all broadcasts dealing with controversial issues were for-

bidden, to the conclusion that broadcasters were not forbidden, thereby, to editorialize as long as opposing points of view were aired. It is significant no persistent attempt was made by WAAB to present opposing views offsetting its own editorials. Again, one can only surmise what the Commission's attitude might have been had that policy been pursued. Yet, it is also significant that no such qualification was expressed by the Commission in outlining the "cannots" imperative upon a licensee who is to operate in the public interest.

Whatever academic and legal positions were argued in attempts to interpret the decision, its practical impact, and therefore its real meaning for the governed, was widely accepted by the broadcasting industry as a flat prohibition against licensee editorializing of any sort. This practical inhibition was to last until 1949.

In view of decisions prior to *Mayflower* it can be convincingly argued that the industry reaction was not overly cautious. The Commission had clearly prohibited the "private use" of broadcast facilities by licensees in the past and the courts had upheld their action in doing so. Language in the decision seemed to categorize licensee editorials as a "private use" of the facility. Witness: "* * * the public interest can never be served by a dedication of any broadcast facility to the support of *his own* partisan ends." And: "The public interest—*not the private*—is paramount." [Emphasis supplied.]

In its "Mayflower" rationale, the Commission seemingly failed to clearly recognize the distinction between "private use: of a facility (as in 'Brinkley')," and the broadcast of licensee's "private views: on 'public issues'." Certainly there is no suggestion the station dealt with "private issues" as in WRAK. If the distinction was recognized, then clearly the Commission, in "Mayflower," did, in fact, reverse its longstanding policy, announced in the annual report of 1928 and affirmed in "WEVO" and "Great Lakes," of permitting broadcasters to take positions on "public issues" if they also broadcast opposing views.

Although some construed the decision to the contrary, "Mayflower" did not abolish the public interest requirement that broadcasters deal in controversial public issues in their other broadcast content. In fact, that responsibility was expressly affirmed in the decision while outlining the most comprehensive description of broadcasting "fairness" requirements which had appeared in Commission action to that time. On this point, the Commission wrote:

> Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount. These requirements are inherent in the conception of public interest set up by the Communications Act as the criteria of regulation.

The clincher, supporting the thesis that licensee editorials were forbidden, was language in the decision based upon WAAB's affida-

vits stating it had stopped editorials and had no plans to editorialize in the future. Upon this point, the Commission said:

> Relying upon these comprehensive and unequivocal representations as to the future conduct of the station and in view of the loss of service to the public involved in the deletion of this station, it has been concluded to grant the application for renewal. Should any future occasion arise to examine * * * the conduct of this licensee, however, the Commission will consider the facts developed in this record in its review of the activities as a whole.

Whatever the impact on other broadcasters, WAAB's renewal was conditioned upon its discontinuance of editorials and representation that it had no plans to resume them. And, to insure that no misunderstanding might arise about their resumption,[13] the Commission implicity advised licensee that it would look with disfavor upon any future reappearance of editorials.

In FCC's Seventh Annual Report, 1941, the following language is found at page 28:

> "The public interest—not the private—is paramount" in radio broadcasting declared the Commission in reprimanding a certain station for past partisanship practices. In its decision and order covering this case, it added: "Under the American system of broadcasting is it clear that responsibilities for the conduct of a broadcast station must rest intially with the broadcaster. It is equally clear that with the limitations in frequencies inherent in the nature of radio, the public interest can never be served by a dedication of any broadcast facility to the support of * * * partisan ends. Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. * * * Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues."

The language internally quoted above is obviously drawn from the "Mayflower" decision. Yet, as reproduced in the report, the extract seems to be merely a restatement of the Commission's 1941 conception of a "fairness doctrine." It certainly does not suggest that licensees had been forbidden to editorialize.

Significantly, the omissions, represented by asterisks in the internal quote from the report, are the portions of the quoted passage which were thought to forbid licensee editorials. The first omission was certainly not in the interests of brevity. The words omitted, "his own," would occupy little more space than the asterisks used to replace them. Obviously the meaning changes. There is a significant difference between: a licensee's "dedication of a broadcast facility to the support of partisan ends" generally, and; a licensee's "dedication of a broadcast facility to the support of 'his own' partisan ends."

The second omission supports the significance of the first one and the conclusion that the Commission intended a far different

meaning in its seventh annual report than is conveyed by the full "Mayflower" decision. There the following text was omitted:

> A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidates of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.

Within a year, the Commission had obviously relented from the hard implications of "Mayflower." One is hard put to determine the reason for remission so quickly. Certainly there was no initial adverse industry or public reaction to the decision. In fact, the industry seemed to accept it without question at that time.[14] Perhaps the Commission, in its internal dialog, realized that, in "Mayflower," it had not properly recognized the distinction between "private issues" and "public issues"; between "private use" of a facility, as in "Brinkley," and the expression of private opinion upon "public issues." Or, recognizing those distinctions, perhaps it decided that it had gone a bit too far in reversing previous policy by flatly forbidding licensee editorials. Otherwise there seems to be no explanation for its incentive to omit very significant portions of the "Mayflower" language from the seventh annual report.

Subsequent to "Mayflower," and before 1949, FCC was to deal with other "fairness" problems worthy of note, and was to issue its most comprehensive discussion of programming policy and responsibility since "Great Lakes."

As previously noted, licensees were expected, from the outset, to deal with important public issues affecting the various responsible elements comprising their community of service. This is the basic affirmative responsibility from which "fairness doctrine" problems arise. It was clear that broadcasters were expected to air the various points of view incident to controversial public issues included in broadcast content. But, what of issues which were not aired? What remedy was available to segments of the public who wished issues discussed that the broadcaster simply ignored or chose, for policy reasons, not to air? If broadcasting was to realize its full potential as a medium for free speech it had to do more than simply air all sides of only those issues it chose to deal with. It would have to deal with all issues relevant to the community it serves. This was the problem confronting the Commission in the WHKC case (docket 6631) decided June 26, 1945.[15]

In 1944, the UAW-CIO filed a petition opposing license renewal of station WHKC. The union contended the station was not operated in the public interest because of its policy refusing sale of time for programs which solicited memberships, and which dealt with controversial subjects such as race, religion, and politics. It was further contended the station did not adhere to its policy uniformly; applying it "strictly to those with whom the management * * * disagrees * * * and loosely or not at all with respect to others." Finally, the union complained WHKC unfairly censored scripts submitted by them. Based upon the petition and an opposition thereto filed by the station, the renewal was set for hearing.

Evidence at hearing disclosed the station's policy, upon which the union's petition was predicated, was governed by provisions of

the Code of the National Association of Broadcasters. At that time, the code provided no time should be sold for presentation of public controversial issues, with the exception of political broadcasts and public forums, and that solicitation of memberships in organizations, whether on paid or free time, should be permitted only for charitable organizations, such as Red Cross, or where the memberships were incidental to the rendering of a commercial service, such as insurance plans, etc.[16]

After hearing and before Commission decision, UAW-CIO and WHKC entered into an agreement affecting the station's future programming policies. Thereupon both parties filed a joint motion requesting Commission approval of the agreement and, after approval, a dismissal of the proceedings. That agreement read as follows:

> The record of the hearing discloses that station WHKC in the past had pursued a policy which it believed to be in the best interests of the public and at no time did the station believe that the application of this policy was contrary to the interests of labor. The record testimony further discloses that at the time of the hearing the station enunciated a revised policy which it had adopted prior to the hearing and which it intends to follow in the future. This policy is as follows:
>
> (*a*) It will be the future policy of station WHKC to consider each request for time solely on its individual merits without discriminations and without prejudice because of the identity of the personality of the individual, corporation, or organization desiring such time.
>
> (*b*) With respect to public issues of a controversial nature, the station's policy will be one of open-mindedness and impartiality. Requests of all individuals, groups, or organizations will of necessity have to be considered in the light of the contribution which their use of time would make toward a well-balanced program schedule, which the station will try at all times to maintain in the interest of the people it serves.
>
> (*c*) Station WHKC will make time available, primarily on a sustaining basis, but also on a commercial basis, for the full and free discussion of issues of public importance, including controversial issues, and dramatizations thereof, in order that broadcasting may achieve its full possibilities as a significant medium for the dissemination of news, ideas, and opinions. And, in doing so, there will be no discrimination between business concerns and nonprofit organizations either in making time available or restricting the use of such time. Nonprofit organizations will have the right to purchase time for solicitation of memberships.
>
> (*d*) Station WHKC will, if it refuses time for public discussion, do so in writing showing reasons for such denial to the extent that requests for time are made in writing.

(*e*) The censorship of scripts is an evil repungnant to the American tradition of free speech and a free press, whether enforced by a Government agency or by a private radio station licensee. Broadcasts by candidates for public office may not be censored under the law. But as to all other broadcasts, station WHKC will not censor scripts, or delete any matter contained in them, except for reasons which it believes to be in accordance with the law and existing regulations as set forth in its statement of policy and as explained and interpreted in the record testimony. In the light of future experience this policy may be changed through action by the courts, the legislature, or by rules of Governmental bodies having jurisdiction over particular subject matter. It will be the policy of the station to adjust its practices to such changes, reflecting at all times the tolerance which the interest of the public renders essential.

(*f*) The station will see that its broadcasts on controversial issues, considered on an overall basis, maintain a fair balance among the various points of view, i.e., over the weeks and months it will maintain such a balance with respect to local and network programs, both sustaining and commercial alike. "The parties believe that the above statement of policy properly sets forth the duties of a licensee under the Communications Act of 1934 with respect to the availability of time for discussion of issues of public importance, the censoring of scripts by licensees, and the maintenance of an overall program balance.".

The Commission accepted the agreement and renewed the license. In doing so, it had this to say:

5. As indicated in paragraph 2 hereof, the present proceeding puts in issue the duties of a licensee, under the statutory mandate, to operate in the public interest, convenience, and necessity, to maintain an overall program balance by providing time on a nondiscriminatory basis for discussion of public controversial issues and for the solicitation of memberships for nonprofit organizations. It is recognized, of course, that the physical limitations on the amount of spectrum space available for radio broadcasting and the large demands upon radio stations for use of time make it impossible for every person desiring to use the facilities of a station to be granted this privilege. Under section 3(h) of the act, broadcast stations are expressly declared not to be common carriers. *These facts, however, in no way impinge upon the duty of each station licensee to be sensitive to the problems of public concern in the community and to make sufficient time available, on a nondiscriminatory basis, for full discussion thereof, without any type of censorship which would undertake to impose the views of the licensee upon the material to be broadcast.* [Emphasis supplied.]

Thus the Commission made it clear a station could not be operated in the public interest while deliberately excluding from its broadcast content some issues of importance to the community.

Again in 1947, the Commission confronted a similar problem presented by the petition of Homer P. Rainey.[17] Rainey, a candidate for Governor of Texas, complained against four stations, contending they would not sell him adequate air time to advance his candidacy. Although the staions' action was held to be reasonable under the circumstances, the Commission discussed licensee responsibility in affording time for candidates. It held public interest requires licensees not to arbitrarily deny or restrict the right of any person or group to discuss public controversial issues. And, where election campaigns are involved, the licensee has a responsibility to afford broadcast time to candidates in amounts bearing a reasonable relationship to the needs or public interest in each particular campaign.

Later, in 1948, while dealing with allegations of prejudice against Negroes and Jews in another case,[18] the Commission would say:

> The fairness with which a licensee deals with particular racial or religious groups in the community, in the exercise of his power to determine who can broadcast over his facilities, is clearly a substantial aspect of his operation in the public interest.

Thus, in three instances, FCC declared broadcasters should not, unreasonable or arbitrarily, deny their facilities for discussion of controversial public issues, including appearances by political candidates. Nor should they discriminate against particular groups, whether racial, religious, or economic, in their programing policies. If they are to operate in the public interest, according to these decisions, broadcasters may not black out or simply refuse to permit discussion of selected controversial issues of importance to their communities; even though full and balanced discussion of other controversial issues may have occurred.

In April of 1945 FCC announced a policy of more detailed review of broadcast station performance when passing upon applications for license renewal. Thereafter, on March 7, 1946, it issued its report *Public Service Responsibility of Broadcast Licensees.* That document, popularly called "The Blue Book," was designed to apprise broadcast licensees of the Commission's policies and procedures in reviewing renewal applications. It emphasized programing policies and content. The report was based upon a far-reaching study of industry policy, practices, and revenues. It is, by far, the most comprehensive statement of its sort in the history of the Commission.

Reprinted here is the full text, beginning at page 39, of the Commission's "Blue Book" comments on broadcast discussion of public issues:

C. DISCUSSION OF PUBLIC ISSUES

> American broadcasters have always recognized that broadcasting is not merely a means of entertainment, but also an unequaled medium for the dissemination of news,

information, and opinion, and for the discussion of public issues. Radio's role in broadcasting the election returns of November 1920 is one of which broadcasters are justly proud; and during the quarter of a century which has since elapsed, broadcasting has continued to include news, information, opinion, and public discussion in its regular budget of program material.

Especially in recent years, such information programs as news and news commentaries have achieved a popularity exceeding the popularity of any other single type of program. The war, of course, tremendously increased listener interest in such programs; but if broadcasters face the crucial problems of the postwar era with skill, fairness, and courage, there is no reason why broadcasting cannot play as important a role in our democracy hereafter as it has achieved during the war years.

The use of broadcasting as an instrument for the dissemination of news, ideas, and opinions raises a multitude of problems of a complex and sometimes delicate nature, which do not arise in connection with purely entertainment programs. A few such problems may be briefly noted, without any attempt to present an exhaustive list:

(1) Shall time for the presentation of one point of view on a public issue be sold, or shall all such presentations of points of view be on sustaining time only?

(2) If presentations of points of view are to be limited only to sustaining time, what measures can be taken to insure that adequate sustaining time during good listening hours is made available for such presentations, and that such time is equitably distributed?

(3) If time is also on occasion to be sold for presentation of a point of view, what precautions are necessary to insure that the most time shall not gravitate to the side prepared to spend the most money?

(4) Are forums, town meetings, and roundtable type broadcasts, in which two or more points of view are aired together, intrinsically superior to the separate presentation of points of view at various times?

(5) Should such programs be sponsored?

(6) What measures will insure that such programs be indeed fair and well balanced among opposing points of view?

(7) Should locally originated discussion programs, in which residents of a community can themselves discuss issues of local, national, or international importance be encouraged, and if so, how?

(8) How can an unbiased presentation of the news be achieved?

(9) Should news be sponsored, and if so, to what extent should the advertiser influence or control the presentation of the news?

(10) How and by whom should commentators be selected?

(11) Should commentators be forbidden, permitted, or encouraged to express their own personal opinions?

(12) Is a denial of free speech involved when a commentator is discharged or his program discontinued because something which he has said offended (*a*) the advertiser, (*b*) the station, (*c*) a minority of his listeners, or (*d*) a majority of his listeners?

(13) What provisions, over and above section 315 of the Communications Act of 1934, are necessary or desirable in connection with the operation of broadcast stations during a political campaign?

(14) Does a station operate in the public interest which charges a higher rate for political broadcasts than for commercial programs?

(15) The Federal Communications Commission is forbidden by law to censor broadcasts. Should station licensees have the absolute right of censorship, or should their review of broadcasts be limited to protection against libel, dissemination of criminal matter, etc.?

(16) Should broadcasters be relieved of responsibility for libel with respect to broadcasts over which they exercise no control?

(17) Should the "right to reply" to broadcasts be afforded; and if so, to whom should the right be afforded, and under what circumstances?

(18) When a station refuses time on the air requested for the discussion of public issues, should it be required to state in writing its reasons for refusal? Should it be required to maintain a record of all such requests for time, and of the disposal made of them?

(19) What measures can be taken to open broadcasting to types of informational programs which contravene the interests of large advertisers—for example, news of the reports and decisions of the Federal Trade Commission concerning unfair advertising; reports of the American Medical Association concerning the effects of cigarette smoking; temperance broadcasts; etc.?

These are only a few of the many questions which are raised in complaints to the Commission from day to day. The future of American broadcasting as an instrument of democracy depends in no small part upon the establishment of sound solutions to such problems, and on the fair and impartial application of general solutions to particular cases.

Under the Communications Act, primary responsibility for solving these and similar issues rests upon the licensees of broadcast stations themselves. Probably no other type of problem in the entire broadcasting industry is as important or requires of the broadcaster a greater sense of objectivity, responsibility, and fairplay.

While primary responsibility in such matters rests with the individual broadcaster, the Commission is required by the statute to review periodically the station's operation, in order to determine whether the station has in fact been

operated in the public interest. Certainly, the establishment of sound station policy with respect to news, information, and the discussion of public issues is a major factor in operation in the public interest.

The Commission has never laid down, and does not now propose to lay down, any categorical answers to such questions as those raised above. Rather than enunciating general policies, the Commission reaches decisions on such matters in the crucible of particular cases.

One matter of primary concern, however, can be met by an overall statement of policy, and must be met as part of the general problem of overall program balance. This is the question of the quantity of time which should be made available for the discussion of public issues.

The problems involved in making time available for the discussion of public issues are admittedly complex. Any vigorous presentation of a point of view will of necessity annoy or offend at least some listeners. There may be a temptation, accordingly, for broadcasters to avoid as much as possible any discussion over their stations, and to limit their broadcasts to entertainment programs which offend no one.

To operate in this manner, obviously, is to thwart the effectiveness of broadcasting in a democracy.

A test case may illustrate the problem here raised. At the request of the Senate Committee on Interstate Commerce, the Commission undertook a study of all network and local programs broadcast from January 1, 1941, through May 31, 1941, relative to the foreign policy issue then before the country, that of isolationism versus intervention in the world conflict. The period reviewed was one of great crisis. The issue at stake would affect the history and even the survival of our country and its institutions. Five major questions of foreign policy were involved—lease-lend, the convoying of ships to Britain, the acquisition of foreign bases, the acquisition of foreign ships, and the maintenance of the British blockade. From this study the following facts emerged.

The four major networks submitted 532 programs. Upon analysis only 203 scripts were deemed relevant; 14 scripts were unobtainable.

Assuming all 14 of these scripts to have been relevant, this means that 217 scripts during a 5-month period dealt with the five major issues of foreign policy listed above. Put another way, each network broadcast a program devoted to one or more of these issues every third day.

But while the networks made these programs available, not all affiliated stations carried them. Of 120 CBS affiliates, 59.3 percent carried the average lend-lease program. Of 165 MBS affiliates, 45.5 percent carried it. Of the approximately 200 NBC stations on both Red and Blue networks of NBC, 69 stations carried the average NBC program on lend-lease.

> Even more significant are the figures relating to nonnetwork programs. Of 842 stations reporting, only 288 claimed to have originated even one program on any subject relevant to this study. The remaining 454 denied having broadcast a single nonnetwork program on foreign policy during the entire 5-month period. While subject to a possible sampling error, the study indicates that station time devoted to discussion programs distributed by the four networks exceeded station time devoted to discussion programs originating by the stations in the ratio of 30 to 1.
>
> The carrying of any particular public discussion, of course, is a problem for the individual broadcaster. But the public interests clearly requires that an adequate amount of time be made available for the discussion of public issues; and the Commission, in determining whether a station has served the public interest, will take into consideration the amount of time which has been or will be devoted to the discussion of public issues.

Concluding the report, the Commission again mentioned discussion of public issues. At page 56, it said:

> (3) *Programs devoted to the discussion of public issues.*—The crucial need for discussion programs, at the local, national, and international levels alike is universally realized, as set forth on pages 39 and 40. Accordingly, the carrying of such programs is reasonable sufficiency, and during good listening hours, is a factor to be considered in any finding of public interest.

In addition to public issue programming, the report dealt with all aspects of programing practices, including the frequency and content of commercial announcements.

Industry reaction to the "Blue Book" was immediate and in *Broadcasting* magazines, Louis G. Caldwell, former General Counsel of the Federal Radio Commission, wrote about the report using this language:

> When FCC adopted its report on "Public Service Responsibilities of Broadcast Licensees." March 7, a legal fiction, which germinated almost unnoticed in the first hearing before the FRC in 1927, came out in full bloom. The fiction is that the slogan "public interest, convenience, or necessity," embraces governmental regulations of broadcasting programs, and that section 326 of the Communications Act, denying the FCC power of censorship, is impotent against this most effective and most dangerous method of censoring.

Justin Miller, then president of NAB, was the most outspoken industry figure in opposition to the report. Advancing the position that section 326 of the Communications Act and the first amendment forbade any such oversight of programming, Judge Miller became the leader of industry opposition. Criticism of the Commission was so widespread and tensions so high that Chairman Charles Denny, Jr., at a 1946 NAB general luncheon, would say:

> My host [President Miller] in various public statements over the Nation since the publication of the "Blue Book" has been teasing the Commission, saying we are stooges for the Communists. He has said that we have violated the first amendment which guarantees freedom of speech. He has called us obfuscators, intellectual smart alecs, professional appeasers, guileful men, astigmatic perverters of society. Now, these comments haven't cooled our friendship because, you see, we believe in free speech.

It was in this atmosphere of industry criticism and opposition that *Mayflower* was recalled and its phrase: "In brief, the broadcaster cannot be an advocate" became the rallying cry of those who contended FCC had indeed stripped broadcasters of their first amendment rights.

Thereafter, criticism and pressure continued to mount. At the January 1947 regional meeting of NAB in Salt Lake City, a resolution was unanimously adopted calling for revision of *Mayflower* and establishment of the right of broadcasters to air their own views. Editorials urging the same end began to appear more frequently in the trade press. Members of the Commission indicated in public statements that a review of *Mayflower* might be desirable. An amendment of the Communications Act, which would declare the broadcaster's right to editorialize, was introduced in the Senate and extensive hearings were held in June of 1947.

Also, in June of 1947, Cornell University, licensee of WHCV, filed a petition with FCC requesting a declaratory ruling on the question whether a station might broadcast its own views, along with those of others, in connection with a public issue then pending in its community. Earlier, Chairman Denny had told a House Approriations Subcommittee that the Commission was planning to hold hearings on the subject.

So it was that, on September 5, 1947, FCC issued an order setting hearings to begin on January 12, 1984, to inquire into the question of licensee editorializing. The issues proposed for review were set out as follows:

> 1. To determine whether the expression of editorial opinions by broadcast station licensees on matters of public interest and controversy is consistent with their obligations to operate their stations in the public interest.
>
> 2. To determine the relationship between any such editorial expression and the affirmative obligation of the licensees to insure that a fair and equal presentation of all sides of controversial issues is made over their facilities.[19]

After having been postponed to afford all prospective witnesses additional time to prepare, the hearings began on March 1, 1948. Following an interim recess, they were concluded April 21, 1948, with a total of 8 days' testimony. Forty-nine witnesses were heard on behalf of the industry and the public. They wre representative of a cross section of broadcasting and American society. More than a year later, on June 2, 1949, the Commission issued its report, "Editorializing by Broadcast Licensees." the *Mayflower* ban was lifted and the fairness doctrine, as presently understood, was pro-

nounced. Before turning to that report it will be well to examine two more FCC decisions which preceeded it.

Twenty days after publication of the "Blue Book," the Sam Morris decision was issued.[20] Morris, acting on behalf of the National Temperance and Prohibition Council of Washington, D.C., objected to license renewal of KRLD, Dallas, Tex. Alleging KRLD pursued a policy of selling choice time for broadcasts counseling the drinking of alcoholic liquors, Morris contended the station would not sell equally choice radio time, or any time whatever, for broadcast of messages opposing consumption of alcohol. This policy, he contented, was against the public interest. Most of the offending broadcasts originated with the CBS radio network and CBS likewise refused to sell Morris time for presenting opposing views. Aggravating the practice, in Morris' view, was the fact that a large percentage of KRLD's coverage area was legally "dry" by local option.

KRLD and CBS responded to the petition, contending advertisements of commercial goods or services may not be construed as controversial. Supporting this view, CBS attempted to distinguish advertising from propaganda. Disposing of that argument, the Commission said:

> * * * the very real and troublesome problem presented by the instant petition cannot be so readily disposed of by the application of a handy nomenclature. For reflection about the nature of advertising reveals that it is indeed a species of propaganda, designed to induce the audience to use a given product or to prefer it to another. The fact that the entertainment afforded by the sponsor may count for more than his announcements about the merits of his product in winning audience favor for his product must not obscure the fact that advertising is, in essence, a form of propaganda. That propaganda may be implicitly or expressly based on a genuine difference of view as to the relative merits of one product or type of product over another. Thus, difference may exist as to the relative merits of plastics and metals, or of aluminum and other metals.
>
> Ordinarily, differences of this character, based upon diversity of preferences and commercial competition, do not raise issues of public importance. Difference concerning the relative merits of one product over another does not usually divide the community by raising basic and important social, economic, or political issues. But it must be recognized that under some circumstances it may well do so.
>
> Without at this time passing on such factual issues as whether broadcast time has been unfairly denied on whether petitioner is an appropriate representative to press for the securing of time, it can at least be said that the advertising of alcoholic beverages over the radio can raise substantial issues of public importance. It is hardly necessary to point out that the question whether the sale and consumption of alcoholic beverages should be prohibited by law is frequently an issue of public importance. That

is not here disputed, for KRLD points out that it has made time available for discussion of that issue in connection with local option elections.

* * * * *

What is for other individuals merely a routine advertising plug extolling the virtues of a beverage, essentially no different from other types of product advertising, is for these individuals the advocacy of a practice which they deem to be detrimental to our society. Whatever the merits of this controversy * * * it is at least clear that it may assume the proportions of a controverted issue of public importance. The fact that the occasion for the controversy happens to the advertising of a product cannot serve to diminish the duty of the broadcasters to treat it as such an issue.

It is clear from this language that FCC believed its "fairness" requirement extended to advertisements for the sale of products and services in some instances. In this particular instance, advertisement of alcoholic beverages, it was held to apply. In view of the foregoing language one might be led to think the Morris petition was granted. Just the opposite result was reached. Justification given for denying the petition is interesting. The Commission found a vast majority of other licensees followed policies identical to KRLD and CBS. Being so widespread across the industry, it was deemed unfair to punish KRLD for policies common to all. By March 27, 1946, the regulator had obviously lost its stomach for the sternest of sanctions, licensee revocation. This is also apparent in the *Scott* decision to follow on July 19, 1946.[21]

Robert Harold Scott petitioned for license revocation of three California stations, KQW, KPO, and KFRC. Scott was an atheist. He had attempted to purchase time to present programs devoted to atheism. He claimed all the stations refused him time, either paid or otherwise, while permitting the use of their facilities for "direct statements and arguments against atheism as well as for indirect arguments, such as church services, prayers, Bible readings, and other kinds of religious programs."

Responding, KFRC stated its "firm belief that it would not be in the public interest to lend our facilities to Mr. Scott for the dissemination and propagation of atheism." KPO contended "it is difficult to imagine that a controversial issue exists in the usual sense of that phrase, on the subject of the existence of a God merely because of the nonbelief of a few." And KQW admitted it refused time to Scott for "broadcasting of atheistic talks," contending it was not in the public interest to do so. Further the station contended a controversial public issue was not presented and in any event, "if a public controversial question was tendered, it was not of sufficient public moment and did not present a question so uppermost or important in the minds of the public to justify its broadcast in the public interest with consequent displacement of an existing program service." Finally KQW argued it had acted within its legal rights and that "the Commission is not by statue authorized to sub-

stitute its judgment for that of the licensee under the circumstances.* * *"

Scott, in his petition, had asserted:

> I do not throw stones at church windows. I do not mock at people kneeling in prayer. I respect every man's right to have and to express any religious belief whatsoever. But I abhor and denounce those who, while asserting this right, seek, in one way or another, to prevent others from expressing contrary views.

The Commission determined that the proposed broadcasts did not involve blasphemous attacks upon the Deity nor abusive or intemperate attacks upon any religious belief or organization.

Discussing these arguments, the Commission would write what has probably been its most eloquent statement of the "fairness" responsibility of broadcasters, saying:

> The first amendment to our Constitution guarantees both religious freedom and freedom of speech. While these guarantees are expressed in terms of limitation on governmental action, they are far more than narrow legalistic concepts. They are essential parts of the fundamental philosophy underlying the form of Government and the way of life which we call "American."
>
> Freedom of religious belief necessarily carries with it freedom to disbelieve, and freedom of speech means freedom to express disbeliefs as well as beliefs. If freedom of speech is to have meaning, it cannot be predicated on the mere popularity or public acceptance of the ideas sought to be advanced. It must be extended as readily to ideas which we disapprove or abhor as to ideas which we approve. Moreover, freedom of speech can be as effectively denied by denying access to the public means of making expressing effective—whether public streets, parks, meeting halls, or the radio—as by legal restraints or punishment of the speaker.
>
> It is true that in this country an overwhelming majority of the people profess a belief in the existence of a Divine Being. But the conception of the nature of the Divine Being is as varied as religious denominations and sects and even differs with the individuals belonging to the same denominations or sects.
>
> God is varioulsy thought of as a "Spirit, infinite, eternal, and unchangeable," and as having a tangible form resembling man who, in turn, was created in His image; as consisting of a Trinity and a single Godhead; as a Divine lawgiver, laying down infallible natural and moral laws by which man is governed, and as God who concerns himself with the personal affairs of individuals, however, petty: as a God to whom each person is individually accountable and as a God to be approached only through ordained intermediaries; a God of the powerful who divinely appoints kings and other rulers of men, and as a God of the meek and lowly; as a God of stern justice and a God of mercy; as

a God to be worshipped or appealed primarily through ritual and as a God to be served primarily through service to one's fellow man; as a God whose rewards and punishments are mainly reserved for a future life and as a God also rewards or punishes through spiritual enrichment or impoverishment of man's present existence. These are only a few of the many differing conceptions which might be cited by way of illustration.

So diverse are these conceptions that it may be fairly said, even as to professed believers, that the God of one man does not exist for another. And so strongly may one believe in his own particular conception of God that he may easily be led to say, "Only my God exists, and therefore he who denies my God is an atheist, irrespective of his professed belief in God." For example, the early Christians were to the Romans atheists because they denied the existence of the pagan gods in which the Romans believed.

A rule which denies freedom of expression to the professed atheist should certainly be applied with equal, if not greater, strictness to one whose views are, in fact, atheistic, but who seeks to deny or conceal his atheism. Thus, the necessity arises of making determinations on the basis of personal judgment as to whether views sought to be expressed are, in fact, atheistic. The power then is vested in those making such determination to attach the label of atheism to the believer whose particular belief they may happen to disapprove, and thus of effectively denying the believer the right to express his views. Under such a course, Jefferson, Jackson, Lincoln, and others whose names we revere could, today, be barred from access to the air to express their own particular religious philosophies. The first two were denounced with particular vigor from the pulpits of some of the wealthier and better established churches, and the label of "atheist" was freely attached to Jefferson by those who had come to feel that their favored positions, which were threatened by his social, economic, and political philosophies, were rewards which the Deity had bestowed upon them because of their special virtues and accomplishments.

Underlying the conception of freedom of speech is not only the recognition of the importance of the free flow of ideas and information to the effective functioning of democratic forms of government and ways of life, but also belief that immunity from criticism is dangerous—dangerous to the institution or belief to which the immunity is granted as well as to the freedom of the people generally. Sound and vital ideas and institutions become strong and develop with criticism so long as they themselves have full opportunity for expression; it is dangerous that the unsound be permitted to flourish for want of criticism.

Moreover, however strongly we may feel about the sacredness of religious beliefs, we should be mindful of the fact that immunity from criticism cannot be granted to religion without at the same time, granting it to those who

use the guise of religion to further their ends of personal profit or power, to promote their own particular political or economic philosophies, or to give vent to their personal frustrations and hatreds. "False prophets" are not phenomena peculiar to Biblical days. Their danger now, as then, lies essentially in the difficulty of recognizing them as such. The difficulty is increased to the extent that their doctrines and motives are shielded from critical examination.

We recognize that in passing upon requests for time a station licensee is confronted with most difficult problems. Since the demands for time may far exceed the amount available for broadcasting a licensee must inevitably make a selection among those seeking it for the expression of their views. He may not even be able to grant time to all religious groups who might desire the use of his facilities, much less to all who might want to oppose religion. Admittedly, a very real opportunity exists for him to be arbitrary and unreasonable, to indulge his own preferences, prejudices, or whims; to pursue his own private interest or to favor those who espouse his views, and discriminate against those of opposing views. The indulgence of that opportunity could not conceivably be characterized as an exercise of the broadcaster's right of freedom of speech. Nor could it fairly be said to afford the listening audience that opportunity to hear a diversity and balance of views, which is an inseparable corollary of freedom of expression. In making a selection with fairness, the licensee must, of course, consider the extent of the interest of the people in his service area in a particular subject to be discussed, as well as the qualifications of the person selected to discuss it. Every idea does not rise to the dignity of a "public controversy," and every organization, regardless of membership or the seriousness of its purposes, is not per se entitled to time on the air. But an organization or idea may be projected into the realm of controversy by virtue of being attacked. The holders of a belief should not be denied the right to answer attacks upon them or their belief solely because they are few in number.

The fact that a licensee's duty to make time available for the presentation of opposing views on current controversial issues of public importance may not extend to all possible differences of opinion within the ambit of human contemplation cannot serve as the basis for any rigid policy that time shall be denied for the presentation of views which may have a high degree of unpopularity. The criterion of the public interest in the field of broadcasting clearly precludes a policy of making radio wholly unavailable as a medium for the expression of any view which falls within the scope of the constitutional guarantee of freedom of speech.

Yet, in spite of this language, the renewals were not set for hearing. Reasoning as it did in the *Morris* case, the Commission said:

> * * * the issue here involved is one of broad scope and it is not restricted to the three stations which are the subject of Mr. Scott's complaint. We therefore do not feel that we would be warranted on the basis of this single complaint in selecting these three stations as the subject of a hearing looking toward terminations of their licenses, when there is no urgent ground for selecting them rather than many other stations. But, lest our dismissal of Mr. Scott's petition be misconstrued, we feel that we should make our position entirely clear, as we did in dismissing the petition of the Reverend Sam Morris.

These words, sounding as caveat, leave one to wonder which of its positions the Commission wished to make "entirely clear." Was it thereafter clear the public interest required atheists to be heard? Or, was it clear, in instances of widespread violation, that licensees need not fear any Commission sanction? That the decision was not subsequently taken as caveat will be shown later.

Why, after it unrelenting early record of license revocation for content reasons, did the Commission in "Morris" and "Scott", seem so reluctant to punish offending licensees? The only available sanction, license revocation, was, and remains, indeed severe. Yet the Commission, then as now, had the statutory power to adopt rules. Rules, if violated, could be punished with fines and forfeitures, far short of revocation. In view of "Morris" and "Scott" immediately following the "Blue Book", with its detailed and encompassing principles governing broadcast content, one wonders why rulemaking did not appeal to the Commission.

Perhaps one explanation lies in industry's reaction to the "Blue Book." By the time of "Morris", criticism of any FCC involvement in programing was heated. By the time of "Scott", it was widespread. Never before had opposition been so adamant and criticism so powerful. Perhaps, out of the "Blue Book" reaction, FCC developed a regulated timidity it has never overcome. Significantly, at this writing, it is yet to order any encompassing rules supporting its "Blue Book" principles and, since the publication of that document, no case of license revocation or nonrenewal can be found for violation of its imperatives.

3. The editorializing report of 1949

Thought by some to be the origin of the "fairness doctrine," the 1949 report on editorializing [23] merely collected and summarised the Commission's previous "fairness" decisions, with one notable exception. The hard implications of "Mayflower" were rejected and licensees were clearly permitted to editorialize.

Reaffirming licensee responsibility to deal with controversial public issues, the Commission said:

> The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station.

In dealing with those issues, the licensee could not be arbitrarily selective, dealing with some and ignoring others. Although this point is not forcefully emphasized in the report, no doubt the Commission had that in mind when it said:

> But the inevitability that there must be some choosing between various claimants for access to licensee's microphone, does not mean that the licensee is free to utilize his facilities as he sees fit or in his own particular interests as contrasted with the interests of the general public. The Communications Act of 1934, as amended, makes clear that licenses are to be issued only where the public interest, convenience or necessity would be served thereby. And we think it equally clear that one of the basic elements of any such operation is the maintenance of radio and television as a medium of freedom of speech and freedom of expression for the people of the Nation as a whole * * *. It would be inconsistent * * * to assert that, while it is the purpose of the act to maintain the control of the United States over radio channels, but free from any regulation or condition which interferes with the right of free speech, nevertheless * * * [licensees] * * * may themselves make radio unavailable as a medium of free speech * * *. Congress intended that radio stations should not be used for the private interest, whims, or caprices of the particular persons who have been granted licenses, but in manner which will serve the community generally and the various groups which make up the community.

As before, in dealing with controversial issues, the licensee retained an obligation to air opposing points of view. Describing that responsibility, the Commission said:

> If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available on demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of the opposing viewpoints.

Considering the role of licensee editorials in dealing with controversial issues the Commission recognized, even in a scheme where licensee editorials are banned, the broadcaster may insure the broadcast of his own personal views through his power to select programs and commentators. Yet, the argument was advanced during hearing that direct editorials would have far greater impact on opinion than other broadcast content and would inevitably

result in overemphasis upon the side which the licensee chose to espouse. Responding to this argument, the Commission reasoned:

> We do not believe that any such consequence is either inevitable or probable, and we have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest.

Another concern which surfaced during hearings was that station control and utilization of production facilities could lead to imbalance in presenting opposing views. This concern was disposed of with these words:

> 15. Similarly, while licensees will in most instances have at their disposal production resources making possible graphic and persuasive techniques for forceful presentation of ideas, their utilization for the promulgation of the licensee's personal viewpoints will not necessarily or automatically lead to unfairness or lack of balance. While uncontrolled utilization of such resources for the partisan ends of the licensee might conceivably lead to serious abuses, such abuses could as well exist where the station's resources are used for the sole use of his personal spokesmen. The prejudicial or unfair use of broadcast production resources would in either case, be contrary to the public interest.

In assessing licensee performance at renewal time, the Commission announced it would adhere to its established policy of considering overall broadcast service. Standards of reasonableness and fairplay would prevail. No rigid "fairness" rules would control. This is how the Commission explained it:

> While this Commission and its predecessor, the Federal Radio Commission, have, from the beginning of effective radio regulation in 1927, properly considered that a licensee's overall program service is one of the primary indicia of his ability to serve the pubic interest, actual consideration of such service has always been limited to a determination as to whether the licensee's programing, taken as a whole, demonstrates that the licensee is aware of his listening public and is willing and able to make an honest and reasonable effort to live up to such obligations. The action of the station in carrying or refusing to carry any particular program is of relevance only as the station's actions with respect to how such program fits into its overall pattern of broadcast service, and must be considered in the light of its other program activities. This does not mean, of course, that stations may, with impunity, engage in a partisan editorial campaign on a particular issue or series of issues provided only that the remainder of its program schedule conforms to the statutory norm of fairness; a licensee may not utilize the portion of its broadcast service which conforms to the statutory requirements as a cover or shield for other programing which fails to meet the

> minimum standards of operation in the public interest. But it is clear that the standard of public interest is not so rigid that an honest mistake or error in judgment on the part of a licensee will be or should be condemned where his overall record demonstrates a reasonable effort to provide a balanced presentation of comment and opinion on such issues. The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved. It does not require any appraisal of the merits of the particular issue to determine whether reasonable efforts have been made to present both sides of the question.

Concluding the report, the Commission summarized:

> To recapitulate, the Commission believes that under the American system of broadcasting the individual licensees of radio stations have the responsibility for determining the specific program material to be broadcast over their stations. This choice, however, must be exercised in a manner consistent with the basic policy of the Congress that radio be maintained as a medium of free speech for the general public as a whole rather than as an outlet for the purely personal or private interests of the licensee. This requires that licensees devote a reasonable percentage of their broadcasting time to the discussion of public issues of interest in the community served by their stations and that such programs be designed so that the public has a reasonable opportunity to hear different opposing positions on the public issues of interest and importance in the community. The particular format best suited for the presentation of such programs in a manner consistent with the public interest must be determined by the licensee in the light of the facts of each individual situation. Such presentation may include the identified expression of the licensee's personal viewpoint as part of the more general presentation of views or comments on the various issues, but the opportunity of licensees to present such views as they may have on matters of controversy may not be utilized to achieve a partisan or one-sided presentation of issues. Licensee editorialization is but one aspect of freedom of expression by means of radio. Only insofar as it is exercised in conformity with the paramount right of the public to hear a reasonably balanced presentation of all responsible viewpoints on particular issues can such editorialization be considered to be consistent with the licensee's duty to operate in the public interest. For the licensee is a trustee impressed with the duty of preserving for the public generally radio as a medium of free expression and fair presentation.

Thus, the foundation of a modern "fairness doctrine" was laid. Subsequent problems involving fairness would be resolved against a background of the 1949 report, culminating a bitter struggle, beginning with the "Blue Book," licensee advocacy was vindicated.

But the report was a victory only in part for organized broadcasting. Industry insistence that the First amendment and section 326 of the act forbade any regulatory oversight of broadcast content was rejected and the "fairness doctrine" retained.

When the 1949 report was adopted, a quorum of five Commissioners was present. Two members were out of the country and did not participate. Of those present, three voted to adopt the report and two dissented. From a total of seven, action was initiated by three, less than a majority of the full Commission. Yet, the legality of the decision cannot be attacked on this ground. The matter was considered before a lawful quorum and a majority of those present voted in favor of the report.

One of the majority, Commissioner Webster, although adopting the report, was not completely satisfied with it. His concern was expressed in additional views filed by him. The majority report, he thought, "* * * leaves a licensee in a quandary and a state of confusion in that he must follow with his own interpretation of an involved academic legal treatise to determine what he can or cannot do in his day-to-day operation. He is entitled to know from the Commission just that—'What he can or cannot do'—in as concise and unequivocal language as possible."

One of the minority, Commissioner Jones, agreed that licensees should have the right to editorialize and felt any inhibition of that right, including "Mayflower," violates the First amendment. For that reason he opposed "fairness" requirements as unconstitutional restrictions upon the licensee. Yet, since the majority felt otherwise, he criticized the report on other grounds as well, saying: "I do not believe the conditions imposed here are made clear enough to serve as an adequate majority felt otherwise, he criticized the required to follow . . ." He argued that "fairness" requirements should be codified and adopted as rules and regulations of the Commission.

The other dissenter, Commissioner Hennock, foresaw problems of policing. Expressing accord with the principle of "fairness," yet reservations about licensee editorials, she said:

> I agree with the majority that it is imperative that a high standard of impartiality in the presentation of issues of public controversy be maintained by broadcast licensees. I do not believe that the Commission's decision, however, will bring about the desired end. The standard of fairness as delineated in the report is virtually impossible of enforcement by the Commission with our present lack of policing methods and with the sanctions given us by law. We should not underestimate the difficulties inherent in the discovery of unfair presentation in any particular situation, or the problem presented by the fact that the sole sanction the Commission possesses is total deprivation of broadcast privileges in a renewal or revocation proceding which may occur long after the violation.
>
> In the absence of some method of policing and enforcing the requirement that the public trust granted a licensee be exercised in an impartial manner, it seems foolhardy to permit editorialization by licensees themselves. I believe

> that we should have such a prohibition, unless we can substitute for it some more effective method of insuring fairness. There would be no inherent evil in the presentation of a licensee's viewpoint if fairness could be guaranteed. In the present circumstances, prohibiting it is our only instrument for insuring the proper use of radio in the public interest.

In its preface to the report, the majority had said: "Because of the importance of the issues * * * and because of the possible confusion which may have existed in the past * * * we have deemed it advisable to set forth in detail and at some length our conclusions * * *. That confusion would not be avoided in the future and that problems foreseen in the comments of Commissioners Webster, Jones, and Hennock, would arise is demonstrated by developments after 1949. Let us now turn to some of those developments.

4. After 1949

The first occasion for Commission interpretation of its 1949 report involved, the editorial practices of station WLIB, New York City. The station had broadcast a series of editorials favoring establishment of a National Fair Employment Practices Commission, and admitted it did not take affirmative steps to seek out and present opposing points of view. While admonishing WLIB and requesting that it advise about future policies in this connection, the Commission said:

> In our report * * * it was made clear that the licensee has an affirmative duty to *seek out, aid, and encourage* the broadcast of opposing views on controversial questions of public importance.[23] [Emphasis supplied.]

The italicized language does not coincide with the text of the report. The licensee's responsibility was described there as "an affirmative duty generally to *encourage and implement* the broadcast of all sides of controversial public issues * * *." [Emphasis supplied.]

The obligation of WLIB, "seek out, aid, and encourage," appeared in subsequent "fairness" decisions until July 29, 1959. In the meantime, industry criticism of and resistance to the duty to "seek out" opposing views began to mount. By 1958, the Illinois Broadcasters Association resolved that "the requirement of 'a reasonable standard of fairness' was * * * acceptable but the duty to seek opposing views 'makes practically impossible an editorial policy of force and effect' * * *"[24]

Just as followed the "Blue Book," mounting industry pressure was to be felt by FCC and reflected in its policy. This may be observed in relation to the renewal of station KNOE-TV, Monroe, La. The station had broadcast editorials opposing subscription television and a complaint was filed claiming unfair treatment. In a letter dated July 29, 1959, FCC admonished the station about its failure to present opposing views. Discussing the licensee's responsibility in that regard, the Commission said:

> The Commission has recognized the right of a broadcast licensee to express his own views with respect to contro-

> versial issues of public importance. You have done so in this case. The Commission has also stated that the licensee must follow a reasonable standard of fairness in the presentation of the issues in the controversy and that he has an affirmative duty to *aid and encourage* the broadcast of opposing views by responsible persons.[25] [Emphasis supplied.]

Hence, the original language of the report, "encourage and implement," interpreted in WLIB to mean "seek out, aid, and encourage," envolved in KNOE to read: "aid and encourage." The onerous words, "seek, out," were dropped and subsequent Commission declarations described the licensee duty as one to "aid and encourage" the broadcast of opposing views by responsible persons.

In terms of a broadcaster's day-to-day operations, the extent of his duty to present opposition views is critical. For him, the question is whether he shall be active or passive. If he must "seek out," he is assigned an active role which requires him to identify, locate, and enlist those holding opposing views, or at least ascertain and present opposing views with his own personnel. On the other hand, if he need only "aid and encourage" the presentation of opposing views, his responsibility is far more passive. He might reasonably consider, in that circumstance, he has no responsibility to develop and present opposing views with his own personnel. He might, also reasonably, consider he has encouraged presentation of opposing views by merely broadcasting invitations for such presentations and by making his facilities available upon request of opponents.

There is no doubt that critics of the *WLIB* decision thought the broadcaster's duty should be reasonably discharged by the more passive role. If they were heartened by the langauge change in *KNOE*, they could only be confused thereafter, because the change was merely semantic and not substantive. One does not have to depart from the text of the *KNOE* letter to observe the changes was not radical, Witness:

> Considering all of the circumstances, the Commission is of the view that KNOE–TV's presentation of the subscription television issue was one sided, *without adequate efforts having been made to secure the presentation of the other side* by responsible spokesman. [Emphasis supplied.]

There is no substantial difference between "seek out" and "adquate efforts to secure." Each is a positive duty that cannot be discharged by a passive willingness to "aid and encourage" upon demand. That some affirmative effort by expended is evident from subsequent decisions. It was not until *WRAL* in 1964 that the real meaning of the omission in *KNOE* would become apparent.

On July 26, 1959, the CBS network broadcast an editorial favoring a proposed-amendment of section 315 of the Communications Act. The amendment sought to exempt candidate appearances on certain types of broadcasts from the operation of section 315, Lar Daly of Chicago, a colorful and perennial candidate for public office, complained to FCC about the editorial and sought time over CBS to provide the opposing view. Daly's persistent complaints associated with section 315 had precipitated Commission rulings which necessitated the amendment. He, therefore, insisted he was

uniquely qualified to voice opposition to the editorial position of CBS.

Subsequent to the editorial, CBS did broadcast opposing views, but not in the person of Lar Daly. Ruling against Daly, the Commission said:

> An individual is not entitled to equal time to reply to editorializing * * * on a discussion program * * * because of the fact that he was personally involved in the events giving rise to the issue, * * * where * * * the controversial issue and several points of view were represented by participants in the discussion.[26]

Daly petitioned for reconsideration and subsequently took a court appeal of the Commission's action, but to no avail. Hence, it was established that no particular individual could demand, as a matter of right, the opportunity to present responding views to a controversial issue broadcast, as distinguished from a personal attack. The selection of persons to present various views on controversial public issues was left solely in the discretion of the licensee.

During congressional debate upon the 1959 amendment of section 315, questions arose about the amendment's impact upon the "fairness doctrine." To insure the amendment would not be construed as impinging upon the doctrine, the following words were incorporated in section 315 at the time:

> Nothing in the foregoing sentence shall be construed as relieving broadcasts in connection with the presentation of newscasts, news interviews news documentaries, and on-the-spot coverage of news events, from the the obligation imposed upon them under this act to operate in the public interest and to *afford reasonable opportunity for the discussion of conflicting views on the issues of public importance.* [Emphasis supplied.]

Here, for the first time, Congress afforded legislative recognition of the doctrine's existence. It has been argued, in view of the italicized language, that Congress thereby implicitly ended any affirmative obligation upon a licensee to "seek out" opposing views. The language can be construed as describing the more passive duty opted for by organized broadcasting. One may "afford reasonable opportunity" upon request short of any effort to enlist opposing views. Yet, the Commission did not subsequently interpret the legislative enactment as effecting a diminution of its conception of licensee responsibility for fairness. Its interpretation was probably correct since there is nothing in the legislative history of the amendment to suggest Congress actually intended, thereby, to lessen the licensee burden.

On July 29, 1960, the Commission issued its *Report and Statement of Policy, Re: Commission En Banc Programing Inquiry.*[27] This document, after the fashion of the "Blue Book," sought to describe the licensee responsibilities with respect to programming. The first general policy statement on the subject since the "Blue Book" it was no doubt, prompted in part by the payola and quiz-rigging problems of the late fifties. Reaffirming the "fairness doctrine," the Commission there said:

> Formerly by reason of administrative policy, and since September 14, 1959, by necessary implication from the amended language of section 315 of the Communications Act, the Commission has had the responsibility for determining whether licensees "afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The 1960 programming report also dealt with misleading broadcast content. Early in the text, these words were used:

> Prior to the en banc hearing the Commission had made the position clear that, in fulfilling its obligation to operate in the public interest, a broadcast station is expected to exercise reasonable care and prudence with respect to its broadcast material in order to assure that no matter is broadcast which will deceive or mislead the public.

Later in the report this language is found:

> Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. *With respect to advertising material the licensee has the additional responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter* . . . [Emphasis supplied.]

Implicit in the underlined language is the conclusion that licensees do not have the "responsibility to take all reasonable measures to eliminate any false, misleading, or deceptive matter" from broadcast material other than advertisements. This conclusion is borne out in a later case (*KTYM*) and affords a curious contrast to the ancient *Shuler* case.

Before the 1960 report, there had been no official Commission declaration that licensee editorials were encouraged. The 1949 report had merely made the practice permissive. As late as 1957, FCC saw no particular public interest advantage, between competing applicants for a channel, favoring the applicant who proposed he would editorialize.

In the matter of WORZ (12 P. & F.R.R. 1158) the Commission reasoned that the promise of one applicant to "express editorial opinion from time to time, with provision for the expression of opposing viewpoints, is no basis for preference."

Yet, only 2 years later Chairman John C. Doerfer, speaking before the opening session of the 1958 NAB convention would urge licensees to editorialize and suggest that "shirking of editorial duty invites regulations." On this point the 1960 report was explicit. Discussing the licensee's obligation in programming, the Commission said:

> In the fulfillment of his obligation the broadcaster should consider the tastes, needs, and desires of the public he is licensed to serve in developing his programming and should exercise conscientious efforts not only to ascertain them but also to carry them out as well as he reasonably can. He should reasonably attempt to meet all such needs

and interest on an equitable basis. *Particular areas of interest and types of appropriate service may, of course, differ from community to community and from time to time.* However, the Commission does expect its broadcast licensees to take the necessary steps to inform themselves of the real needs and interests of the areas they serve and to provide programming which in fact constitutes a diligent effort, in good faith, to provide for those needs and interests.

The major elements usually necessary to meet the public interest, needs, and desires of the community in which the station is located as developed by the industry, and recognized by the Commission, have included: (1) Opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) *editorialization by licensees,* (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, (14) entertainment programming. [Emphasis supplied.]

In the eyes of the Commission, editorials had reached full stature. Forbidden as inimical to the public interest in "Mayflower," they were merely tolerated by the 1949 report. But, by 1960, the Commission's attitude had swung a full 180 degrees from "Mayflower." Editorials attained the status of a most favored form of programming. The fact that a licensee broadcast them was evidence that he, indeed, was operating in the public interest.

On June 14, 1960, Senate Resolution 305 was adopted authorizing the Freedom of Communications Subcommittee of the Subcommittee on Communications of the Senate Commerce Committee "to examine, investigate and make a complete study of any and all matters pertaining to—

"(1) Federal policy on uses of Government licensed media for the dissemination of political opinions, news, and advertising, and the presentation of political candidates; and

"(2) a review and examination of information and complaints concerning the dissemination of news by such media."

The final report of that subcommittee was filed on April 17, 1962, including recommendations pertinent to the "fairness doctrine" and editorializing. Although the report was neither adopted nor rejected by the full committee, a historical examination of the "fairness doctrine" necessitates a review of its recommendations.

A summary of those recommendations, relevant to this study, follows:

1. The "fairness doctrine" should be codified and adopted by FCC as a rule, a violation of which would be cause for license revocation.

2. The FCC should act promptly upon complaints, affording an immediate review rather than deferring action thereon until renewal time.

3. Ground rules governing licensee editorializing on behalf of political parties or candidates should be adopted by FCC, including—

(*a*) Licensees should be required to retain on file and available for inspection for a period of not less than 1 week, radio scripts and television films or tapes of editorials on behalf of or in opposition to a party or candidate.

(*b*) Advance notice to the affected party or candidate should be required before such editorials are aired to permit monitoring.

(*c*) A candidate or party opposed by such editorials should be afforded an equal opportunity to use the station's facility for answer.

(*d*) Selection of the spokesman to present such answer should be afforded the candidate or party opposed as a matter of right.

(*e*) Such editorials should be prohibited during a reasonable period (at least 48 hours) before the polls open.

(*f*) Licensee promotion of an editorial, spot announcements, and other advertising should also be qualified for the opposing viewpoint to such editorial.

(*g*) Where a licensee editorializes on behalf of a slate of candidates in one time segment (say 5 minutes) but the time spent on any one candidate is minimal—a few seconds for the mentioning of his name—the opposing candidate or candidates should in fairness be allowed sufficient time for his representative to present adequately the opposing position (say 2½ minutes).

4. FCC should forbid licensees requiring advance scripts of candidate broadcast speeches if the candidate orders a tape recording of his speech, paying in advance, and leaving the recording on file at the station available for audition or reproduction by interested parties.

5. FCC should prohibit any licensee, who has determined in advance not to make time available for candidates in a particular race, from thereafter changing such determination without the acquiescence of all candidates in that race.

6. FCC should prohibit arbitrary cutoff dates for the sale of political time prior to elections.

7. FCC should study controversial issue broadcasting in depth and establish guidelines governing same, including—

(*a*) a requirement that licensees initiate efforts to schedule opposing views, before presenting licensee editorials, to the end that the listeners could be advised at the time of the original broadcast when the opposing views would be heard.

(*b*) and, perhaps, require commercial advertisers, who utilize broadcasts sponsored by them for presentation of views on controversial issues, to make equitable time available on such programs for the presentation of opposing views.

8. FCC should view repeated refusal by a licensee to sell time, for discussion of controversial issues, to such organizations as political parties, labor unions, citizens committees, or business groups as a failure to act in the public interest.

9. FCC should reform its internal procedures for handling and processing fairness and section 315 complaints to the end that the time lag be cut to a minimum. Action to ascertain all necessary

facts for resolution of complaints should commence no later than 24 hours after receipt by the Commission.

10. Licensees should be required by FCC to respond to Commission inquiries on complaints with dispatch and in the event of arbitrary delay, an immediate hearing should be called.

11. FCC should consider establishing a field hearing system, staffed by competent hearing examiners, for prompt evidentiary hearings of fairness and section 315 complaints.

12. Based upon its past experience, FCC should advise Congress exactly what is needed by way of legislation and personnel to preserve the public freedom to hear and to see on the public air waves.

All of the foregoing were addressed by the subcommittee to FCC for implementation through its own initiative. Only one recommendation for Congressional action was included. It reads as follows:

> Section 326 of the Communications Act should be amended to provide additionally:
>
> "Nothing in this act or the foregoing sentence shall prevent the Federal Communications Commission, acting upon a complaint in an 'editorial fairness' case, to direct a licensee to make time available and present the opposing position or a particular person in order that the paramount right of the public to be informed on all sides of public issues be preserved."

Section 326 forbids censorship by FCC. As yet, Congress has not adopted the subcommittee recommendation. As a practical matter, its adoption would be of little import. It merely attempts to restate the "fairness doctrine" principle which FCC has followed.

To what extend FCC was persuaded by the report can only be subjected to speculation. At least in one instance, a spokesman for the Commission acknowledged that its policy was affected by the report. Testifying before the House Subcommittee on Communications and Power on July 16, 1963, Chairman E. William Henry referred to that portion of the report represented by item 3(g) of the foregoing summary. Acknowledging approval of the recommendation, he stated that it had, in substance, become Commission policy. The result was, in instances where several political candidates are mentioned in an editorial, fairness dictates that each be afforded more time for response than was devoted to them in the original editorial. Equal time in some instances would not be fair. Enough time must be afforded to reasonably accommodate an adequate response. The requirement is also referred to in a recent FCC opinion and order adopting the personal attack feature as rule of the Commission.

Three Commission actions in 1962 are particularly relevant to the "personal attack" feature of the "fairness doctrine." Before turning to them, however, we should recall a reference from the 1949 editorializing report. There the Commission said:

> * * * elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist.

The 1949 report offered no guidelines for the handling of personal attack situations. It was not until 1962 that those guidelines began to emerge.

On May 9, 1962, the Commission adopted a memorandum opinion and order renewing the license of station WEBY, Milton, Fla.[28] A petition opposing renewal had been filed alleging that licensee, in a series of editorial broadcasts, had attacked various individuals in the community. While renewing the license, the Commission discussed licensee responsibility associated with "personal attack." Referring to the language of the 1949 report dealing with "personal attack," the Commission wrote:

> Our singling out this area of the problem of fairness for specific treatment reflected not only our concern but our decision that a licensee must act with an especially high degree of responsibility where his broadcast facilities are used to attack a person or group. In appropriate recognition of the serious nature of such attacks, we pointed out that fairness may dictate that "time be allocated" to the person or group attacked. Where, as here, the attacks are of a highly personal nature which impugn the character and honesty of named individuals, the licensee has an affirmative duty to take all appropriate steps to see to it that the persons attacked are afforded the fullest opportunity to respond.

The decision, popularly known as the *Maypoles* case, offers the first Commission definition of "personal attack." It is an attack "of a highly personal nature which impugns the character and honesty of named individuals." It also defines licensee responsibility more explicitly. He "has an affirmative duty to take all appropriate steps to see to it that the persons attacked are afforded the fullest opportunity to respond."

Two months later, on July 13, 1962, the Commission disposed of a complaint against station KBMY, Billings Mont. Clyde T. Ellis, general manager of the National Rural Electric Cooperative Association was attacked in several editorials emanating from the station. The attacks occurred before and during a visit by Mr. Ellis to Billings while attending a Western States Water and Power Conference. Upon learning of the attacks after his arrival, Ellis attempted to secure copies of the editorials from KBMY and complained to the station about the nature of the editorials. The station offered him an opportunity to respond in an interview format with its news director. Ellis refused, objecting to the format. Subsequently, on the day of his departure, the station offered to broadcast tapes to be supplied by Ellis after his return to Washington. It does not appear that copies of the offending broadcasts were ever tendered.

In a letter addressed to the licensee, Billings Broadcasting, Co.,[29] the station was advised of its responsibilities with this language:

> The Commission is of the view that where, as here, a station's editorials attack an individual by name, the fairness doctrine requires that a copy of the specific editorial or editorials shall be communicated to the person attacked

> either prior to or at the time of the broadcast of such editorials so that a reasonable opportunity is afforded that person to reply. This duty on the part of the station is greater where, as here interest in the editorials was consciously built up by the station over a period of days and the time within which the person attacked would have an opportunity to reply was known to be so limited. We note that you have not complied with your stated policy of apprising interested parties of your editorials. We conclude that in failing to supply copies of the editorials promptly to Mr. Ellis and delaying in affording him the opportunity to reply to them, you have not fully met the requirements of the Commission's fairness doctrine. It is hoped that this will serve to make clear the Commission's policy in situations of this kind.

Thus, the *Billings* case provided a new guideline. In instances of "personal attack," the licensee was required to furnish a copy of the offending broadcast to the person attacked, either prior to or at the time of the attacking broadcast.

Still later in 1962, additional "fairness" guidelines emerged. A bitterly contested campaign between Gov. Pat Brown and former Vice President Richard Nixon was underway in California. Over a period of days, two commentators on the staff of station KTTV, Los Angeles, offered numerous comments upon the campaign in their broadcasts. Both supported Nixon and leveled attacks upon Brown, Democratic organizations, and others identified with the Brown camp. The California State Democratic Committee complained to FCC. In a telegram addressed to Times-Mirror Broadcasting Co.,[30] licensee, the Commission discussed the complaint and KTTV's responsibility arising thereform. Here is a passage from that telegram:

> * * * fairness requires that when a broadcast station permits, over its facilities, a commentator or any person other than a candidate, to take a partisan position on the issues involved in a race for political office and/or to attack one candidate or support another by direct or indirect identification, then it should send a transcript of the pertinent continuity on each such program to the appropriate candidate immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast.

Responding to the telegram, KTTV, asked for clarification of the words: "appropriate spokesman." Speculating that Governor Brown might consider himself the appropriate spokesman for response, the station wondered if such an appearance, under the "fairness doctrine" would obligate the station to afford Mr. Nixon equal time under section 315. The Commission replied that section 315 would indeed be invoked if the candidate himself appeared for response. Because of 315 complications, it was held the licensee would not be obligated to permit candidate response, but could insist upon some other appropriate spokesman. In a subsequent telegram dated October 26, 1962,[31] the Commission used this language:

> * * * the selection of a spokesman must be reasonable in terms of the points of view or the issues to be discussed. Where a political candidate has been personally attacked, he should, of course, be given a substantial voice in the selection of a spokesman to respond to such attack. Both the candidate and station concerned should be aware, however, that if the candidate were to speak for himself this would give rise to a right to equal opportunity for all other candidates for the same office.

Times-Mirror added a new dimension to the "fairness doctrine" peculiar to political campaigns. Until then, a licensee was required to furnish copies of broadcasts only in instances of "personal attack." That principle was logically extended to attacks upon candidates. But, Times-Mirror went further. It applies to any broadcast, exclusive of candidate appearances, where, by direct or indirect identification, a candidate is endorsed, a candidate is opposed, and/or a candidate is attacked.

In each of those instances the licensee is obligated to furnish a copy of the broadcast and afford a reasonable opportunity for response by an appropriate spokesman. In the first instance, it is the candidate not endorsed who must be so favored. In the latter two, it is the candidate who is opposed or attacked. In either instance, because of section 315 complications, is the station obligated to permit the candidate himself to respond. Following all other "personal attacks" the offended individual or group has the absolute right to respond. But the candidate must reply with an appropriate spokesman. And he does not have the absolute right to select that spokesman, though the station should give him "a substantial voice in the selection of a spokesman."

On July 26, 1963, the Commission issued a public notice entitled "Broadcast Licensees Advised Concerning Stations Responsibilities Under the Fairness Doctrine as to Controversial Issue Programing." The text of that notice is reproduced here in its entirety:

> Several recent incidents suggest the desirability of calling the attention of broadcast licensees to the necessity for observance of the fairness doctrine stated by the Commission in its opinion of June 1, 1949, in docket No. 8516. The Commission adheres to the views expressed in that opinion and continues to apply that policy: namely, that the licensee has an affirmative obligation to afford reasonable opportunity for the presentation of contrasting viewpoints on any controversial issue which he chooses to cover.
>
> The Commission has undertaken a study to consider what actions, perhaps in the form of a primer or rules, might be appropriate better to define certain of the licensee's responsibilities in this area. Without undertaking at the present time to specify all, or the most important, applications of the policy, it is appropriate to call attention to the Commission's view of its application in three currently important situations:
>
> (*a*) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or

group attacked, wherever located, either prior to or at the time of the broadcast, with a specific offer of his station's facilities for an adequate response (*Clayton W. Mapoles*, 23 Pike & Fischer, R.R. 586, 591; *Billings Broadcasting Company*, 23 Pike & Fischer, R.R. 951, 953).

(*b*) When a licensee permits the use of his facilities by a commentator or any person other than a candidate to take a partisan position on the issues involved in contest for political office or to attack one candidate or support another by direct or indirect identification, he must immediately send a transcript of the pertinent continuity in each such program to each candidate concerned and offer a comparable opportunity for an appropriate spokesman to answer the broadcast (*Times-Mirror Broadcasting Co.*, 24 Pike & Fischer, R.R. 404, 405).

(*c*) When a licensee permits the use of his facilities for the presentation of views regarding an issue of current importance such as racial segregation, integration, or discrimination, or any other issue of public importance, he must offer spokesmen for other responsible groups within the community similar opportunities for the expression of the contrasting viewpoints of their respective groups. In particular, the views of the leaders of the Negro and other community groups as to the issue of racial segregation, integration, or discrimination, and of the leaders of appropriate groups in the community as to other issues of public importance, must obviously be considered and reflected, in order to insure that fairness is achieved with respect to programing dealing with such controversial issues. (*Editorializing Report*, 1 (pt. 3) Pike & Fischer, R.R. 201, 204–206; cf. *WBNX Bctg. Co., Inc*, 4 Pike & Fischer, R.R. 242, 248).

In determining compliance with the fairness doctrine the Commission looks to substance rather than to label or form. It is immaterial whether a particular program or viewpoint is presented under the label of "Americanism," "anti-communism" or "States rights," or whether it is a paid announcement, official speech, editorial, or religious broadcast. Regardless of labor or form, if one viewpoint of a controversial issue of public importance is presented, the licensee is obligated to make a reasonable effort to present the other opposing viewpoint or viewpoints.

The Commission does not seek to prevent the expression of any viewpoint by any licensee on any issue. It does seek to prevent the suppression of other contrasting viewpoints by an licensee on any issue when licensed broadcast facilities have been used for the presentation of one view of the issue. This is required by the public interest standard of the law.

Just over a month later, Doughlas A. Anello, general counsel for National Association of Broadcasters, wrote the Commission requesting the notice be rescinded "so as to remove any implication that there has been any change in the official Commission position as set forth in its 'Report on Editorializing of June 2, 1949.'" The

Mapoles and *Billings* cases each involved station editorials which included personal attacks. Anello argued that script submission and specific offers to respond should be limited to instances where stations were personally involved in attacks. The extension of that requirement to all broadcast attacks was inconsistent with the "Editorializing Report of 1949," he reasoned.

Replying to this contention, by letter dated September 18, 1963, the Commission said:

> The underlying premise of your letter—necessity for the station's personal involvement as a precondition to application of the principles stated in (a) and (b)—is incorrect. The editorializing in paragraph 10 does not so hold:
>
> * * * the station will inevitably be confronted with such questions as whether * * * there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. *The latter's* personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. * * * [Emphasis supplied.]
>
> As shown by the use of the word "latter" (referring to "person making the request"), the "personal involvement" doctrine is directed to the party or group attacked—not the station. See *Clayton W. Mapoles*, 23 Pike & Fischer, R.R. 586, 591. In short, while, as you state, in *Mapoles* and *Billings* there was "station involvement," these cases did not turn on that factor but rather the above-quoted, long-established principle in the editorializing report.
>
> Under fundamental communications policy, the licensee is fully responsible for all matter which is broadcast over his station. It follows that when some program contains a personal attack, the licensee must be "fully aware" of the contents of the program, whatever its source or his actual involvement in the broadcast. The crucial consideration, as we stated in *Mapoles* (at p. 591), is that "his broadcast facilities [have been] used to attack a person or group."

The Commission put to rest idea that its personal attack requirements applied only to licensee editorials or programing in which the licensee was "personally involved." All broadcast content was affected. As a practical matter, this holding portended greater inconvenience. It is a simple matter to afford copies of editorials and other material directly produced by licensee. But it is far more difficult, sometimes impossible, for him to obtain copies of broadcasts produced by others and merely aired over his facility.

Another cogent and practical consideration remained for the licensee. His editorials are unsponsored. They are presented upon his time without revenue. He absolutely controls their content. So, it is not unreasonable to expect that he afford respondents free time as well. But what of commercially sponsored programs? Must he afford free time for response to those? The *Cullman* case would immediately answer these questions.

On September 18, 1963, the Commission addressed a joint letter to Cullman Broadcasting Co., Inc. (WKUL), and Walker County Broadcasting Co., Inc. (WARF),[32] both situated in Alabama. The stations had solicited an advisory opinion detailing their responsibilities arising from the broadcast of a syndicated program series called "Life Line." The producer of the series was not associated with either station. The programs were recorded and supplied by the producer for broadcast upon a commercially sponsored basis.

For a period of time preceding inquiry, the "Life Line" series included an expression of views critical of the proposed nuclear weapons test ban treaty. The chairman of a group called Citizens Committee for a Nuclear Test Ban Treaty requested that both stations afford free time, pursuant to the fairness doctrine, for the broadcast of a tape presenting the other side of the issue. Apparently, no chapter or member of the committee existed in the service area of either broadcaster.

Expressing a tentative conclusion that the fairness doctrine applied only to local issues and the stations' responsibility extended only to a local group or its spokesman, the station invited Commission comment. On this point FCC replied:

> The keystone of the fairness doctrine and of the public interest is the right of the public to be informed—to have presented to it the conflicting views on issues of public importance (sec. 315(a) of the Communications Act; Report on Editorializing by Broadcast Licenses, pars. 6, 7, 9, 14, 21). Where a licensee permits the use of its facilities for the expression of views on controversial local or national issues of public importance such as the nuclear weapons test ban treaty, he must afford reasonable opportunities for the presentation of contrasting views by spokesmen for other responsible groups. There is, of course, no single method by which this obligation is to be met. As the editorializing report makes clear, the licensee has considerable discretion as to the techniques or formats to be employed and the spokesmen for each point of view. In the good faith exercise of his best judgment, he may, in a particular case, decide upon a local rather than a regional or national spokesman—or upon a spokesman for a group, if there be one, which is willing to pay for the broadcast time. Thus, with the exception of the broadcast of personal attacks, there is no single group or person entitled as a matter of right to present a viewpoint differing from that previously expressed on the station.

The fairness doctrine was thus held not limited in its application to purely local issues. Selection of the spokesman is another matter. He is not required to be either local or foreign. His selection is completely in the discretion of each licensee. The important point is not who the spokesman shall be but that opposing points of view are presented.

Since "Life Line" was commercially sponsored and the tendered response was on condition that free time be provided, the stations wondered if they could deny a request for presentation of opposing views unless proponents of those views made the same commercial

arrangements for their broadcast as the original program. The Commission answered in the negative with these words:

> Where the licensee has achieved a fair presentation of contrasting views, either by affording time to a particular group or person of its own choice or through its own programming, the licensee's obligation under the fairness doctrine—to inform the public—will have been met. But, it is clear that the public's paramount right to hear contrasting views on controversial issues of public importance cannot be nullified either by the inability of the licensee to obtain paid sponsorship of time for the broadcast of a view contrary to one already presented in a sponsored program or by the licensee's refusal to consider a request for time to present contrasting viewpoint from an organization on the sole ground that the organization has no local chapter in the community where the station is located. In short, where the licensee has chosen to broadcast a sponsored program which for the first time presents one side of a controversial issue, has not presented (and does not plan to present) contrasting viewpoints in other programming, and has been unable to obtain paid sponsorship for the appropriate presentation of the contrasting viewpoint or, viewpoints, he cannot reject a presentation otherwise suitable to the licensee—and thus leave the public uninformed—on the ground that he cannot obtain paid sponsorship for that presentation.

In complying with the fairness doctrine, the licensee was left free to obtain sponsorship of programs presenting opposing views. Yet, if he is unable to arrange sponsorship, he cannot avoid his obligation to air opposing views simply because the original views are expressed in a commercially sponsored program.

The *Cullman* decision aroused widespread industry criticism which continues to this day. Following its issuance, legislation was introduced in Congress which would negate its impact on broadcasting. No action has even been taken upon those measures and the policy still stands. The practical problem it presents for the broadcaster is apparent. If he is to offer any network, syndicated or other broadcast material, not produced under his supervision, which deals with issues of public importance, he may be subjected to incalculable demands upon his commercial schedule for free time to air opposing views. Thus, the commercial value of sponsored programs dealing with issues of public importance is reduced. Since he has no control over the production of many of them, he cannot control the number of complaints which might arise. He is not inclined to provide unlimited free time for response and therefore must consider sponsored public issue programs as prospectively a unique genre. Though they might have been an excellent source of revenue in the past, they could become an albatross in the future. The net result, in his view, and the view of some producers, is the suppression of commercially sponsored public issue programs. And, that, in the face of a regulatory policy which requires him to deal with issues of public importance.

On July 1, 1964, the Commission adopted its public notice entitled "Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance."[33] Popularly titled "Fairness Primer," it was designed to advise broadcast licensees and members of the public of the rights, obligations, and responsibilities of such licensees under the Commission's 'fairness doctrine' . . ." Reaffirming the 1949 report, the "Fairness Primer" abstracted and reported significant Commission rulings on fairness, hoping "to keep the broadcaster and the public informed of pertinent Commission determinations on the fairness doctrine, and thus reduce the number of these cases required to be referred to the Commission for resolution."

A number of significant cases were reviewed tracing the development of the doctrine after the 1949 report. Among them were cases covered in this discussion. But in addition to its review of previous actions, the primer served as a vehicle to announce, ironically in a footnote, a new limitation on the "personal attack" responsibility, a new definition of "personal attack" and a new exception to licensee duties in the event of personal attack. In footnote 6, the Commission stated:

> As seen from the above rulings, the personal attack principle is applicable where there are statements, in connection with a controversial issue of public importance attacking an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual or group is simply named or referred to. Thus, while a definitive Commission ruling must await a complaint involving specific facts—see introduction, page 3, the personal attack principle has not been applied where there is simply stated disagreement with the views of an individual or group concerning a controversial issue of public importance. Nor is it necessary to send a transcript or summary of the attack, with an offer of time for response, in the case of a personal attack upon a foreign leader, even assuming such an attack occurred in connection with a controversial issue of public importance.

What was the new limitation? The "personal attack" principle would apply only in instances of attack in connection with the discussion of a controversial issue of public importance. What was the new definition? An attack upon "an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual or group is simply named or referred to." The new exception? It is not "necessary to send a transcript or summary of the attack, with an offer of time for response in the case of a personal attack upon a foreign leader. . ."

In the meantime, licensees continued to experience problems arising from their affirmative fairness obligations. Although "KNOE" had eliminated the words "seek out," the phrase "aid and encourage" remained, bothering some for lack of a clear definition. At a minimum, what must a licensee do in his day-to-day operations to satisfy FCC he "aids and encourages" the presentation of opposing views? Although the primer dealt with that responsibility, it established no minimum standards for its fulfillment.

Just over 3 weeks after approval of the primer, FCC ruled favorably upon the renewal application of stations WRAL–AM, FM, and TV, located at Raleigh, N.C. In connection with those renewals, the Commission expressed dissatisfaction with licensee's past fairness policy in dealing with editorial broadcasts carried by the stations. Addressing itself to those policies in a letter dated July 29, 1964, the Commission described them as follows:

> As to your efforts affirmatively to *encourage, and implement* the broadcast of viewpoints contrasting with those presented in your editorials, you have relied, in large part, upon the following assertions: (i) that it is your judgment that the networks' offerings are generally in a direction away from a conservative point of view and therefore, the viewpoints expressed in your editorials tend to balance the network programs carried by your stations; (ii) that a public affairs program of local origin provided an outlet for contrasting viewpoints on controversial issues of public importance; and (iii) that you, at times, provided an appropriate opportunity to respond to editorials and always transmit texts of broadcasts which personally attack individuals or organizations to the persons or groups attacked, with a specific offer of the station's facilities for a response. [Emphasis supplied.]

Note that the words of art are no longer "aid and encourage" as in "KNOE." That phrase here reverts to the original language of the 1949 report, "encourage and implement."

Although FCC felt licensee's past policies were not "adequate to insure compliance with the fairness doctrine," it decided to renew the licenses for two reasons. First, it concluded that licensee, though violating the doctrine in the past, had acted in good faith. Second, it noted that licensee had recently changed its policy so as to broadcast an invitational announcement following each of its editorials which deal with controversial issues. The language of that announcement is as follows:

> Viewpoint is the editorial expression of the Capitol Broadcasting Co., voiced by Jesse Helms, vice president of this company. Dissenting opinion is welcome. When writing, please state clearly your name and address, and indicate your willingness for your expression to be used on the air, along with your name.

In view of the policy change and relying upon licensee's assurance that the new policy would be followed in the future, FCC concluded that public interest would be served by renewal of the licenses.

Thus FCC supplied a minimum standard of compliance with the licenses duty "affirmatively to encourage and implement the broadcast" of opposing points of view. Although not required by law to do so, a licensee who follows each controversial issue broadcast with an invitational announcement and, inferentially, allows responsible parties to air opposing views upon demand, is considered to have complied with the affirmative duty to "encourage and implement" the presentation of opposing views. If he doesn't carry

such an announcement, he must find other ways to "encourage and implement."

Finally FCC had agreed that the licensee duty was the more passive role supported by organized broadcasting. The omission of "seek out" in "KNOE" is given substantive meaning in "WRAL." A licensee who broadcasts an invitation need not seek out or enlist those with opposing views. Neither is he required to supply the opposing views from the resource of his own staff. He can simply sit back and await the demands of responsible persons to be heard. If no demands are received, the opposing view need not be aired.

Let us assume a hypothetical licensee regularly schedules only those public issue programs identified with a particular bias upon issues of the day. Also assume he follows each such broadcast with an invitational announcement and does nothing further to enlist opposing views except in instances of personal attack. Further assume no one ever steps forward requesting the opportunity to offer opposing viewpoints. The net result could be a station that consistently offers its audience only one viewpoint upon all controversial issues. It could even be a blatant propaganda outlet. Yet FCC would consider it has complied with the "fairness doctrine" and is operated in the public interest.

In such a scheme, what happens to the public's right to know? This question points up a basic flaw in the Commission's "fairness doctrine" rationale. It seems to assign licensee the characteristics of a common carrier in his handling of controversial public issues. If viewpoints are aired in his regular programming he has no duty to insure that opposing viewpoints will be aired. He is only required to announce his willingness to do so and offer opposing views only upon demand of a responsible interested outsider. Thus the duty for presentation of balanced public issue program does not rest upon licensee but is delegated by him, with FCC approval, to the public generally. If the public, acting upon each issue as it arises, demands balanced programming, the licensee must carry it. If no such demands are made, the licensee may carry what his fancy dictates without fear of the "fairness doctrine."

It should be pointed out that "WRAL" does not affect the licensee obligation to "seek out" in instances of personal attack. In those instances the licensee remains obligated to contact the offended individual or organization, provide a transcript, tape, or accurate summary and afford a reasonable opportunity for reply.

On June 2, 1965, the Commission found itself again dealing with another pesky atheist, recalling shades of the *Scott* case. Madalyn Murray had complained against 13 Honolulu stations because of their failure to afford her time, as president of the Free-thought Society, to present her views opposing religious broadcasts carried by the stations. Mrs. Murray did not complain about the contents of any specific broadcast but alleged generally that her "free thought" views were "the total antithesis of religion." Each station regularly scheduled religious broadcasts of various types.

Answering the complaint, the licensees variously responded that "free thought" is not a sufficiently controversial issue of public importance in their respective service areas to warrant presentation over their facilities; or that mere broadcast of church services, devotionals, and prayers is not a presentation of controversial issues

of public importance within the meaning of the fairness doctrine. Ruling in favor of the stations, the Commission had this to say:

> A licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokemen to present the viewpoints, and all the other facets of such programing. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programing decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith.
>
> On the basis of the information submitted both by you and the licensees of the above-named stations, we concluded that the licensees have acted reasonably and in good faith.[34]

Perhaps the memory of *Scott*, where this Commission reasoned at length and then concluded contrary to their reasoning, reminded that hard cases make bad law. In any event, whatever the reason, the Commission here concluded and elected not to reason. The *Scott* caveat was ignored.

On June 17, 1986, FCC renewed, without hearing, the license of Station KTYM, Inglewood, Calif.[35] The renewal was opposed and a hearing requested by the Anti-Defamation League of B'nai B'rith (ADL). Objecting to past operation of the facility, ADL focused upon the content of a syndicated radio series called "Richard Cotten's Conservative Viewpoint." The program was alleged to be anti-Semitic, to contain false and misleading materials, and to have contained "personal attacks" upon ADL and its officials.

Following complaint, KTYM offered ADL equal and comparable time for reply to offending Cotten broadcasts. The offer was refused. ADL took the position that it should not respond to anti-Semitic broadcasts and insisted that such material is so contrary to the public interest that a licensee who permits its dissemination should be disqualified from holding a license.

Discussing the content of the Cotten broadcasts, the Commission said:

> The Commission has concluded that the Cotten broadcast of October 7, 1964, contained a personal attack on the ADL and its general counsel, Mr. Forster. The other broadcasts referred to did not contain personal attacks on ADL or its officials, but did contain statements that can be regarded as anti-Semitic, and that will surely be highly offensive to many persons of the Jewish faith, as well as to fair-minded people of other faiths. In order to preclude any possibility that the ruling of the Commission might be construed by anyone as indicating a contrary view, it is hereby declared that the individual Commissioners wholly disapprove of broadcasts which encourage bigotry or prejudice against any race, religion, or group. Individual Com-

missioners joining in this opinion have the strongest personal feelings against the views represented by the assailed broacasts, and others similar to them, but believe that the action of the Commission must be governed by legal principles rather than the personal feelings of the Commissioners.

The Commission then turned to the issues persented, posing two questions:

> This controversy has engendered deep, understandable, and proper emotions on both sides, and these have resulted in a mass of documents and discussion. However, the issue that is now presented is relatively simple: should the Commission act to suppress the expression of views which it abhors or to require the opportunity for the expression of opposing views? From the viewpoint of the broadcaster, does a licensee fulfill his legal duty when he offers adequate and comparable time to reply to *broadcasts containing allegedly defamatory and false comment, or has a broadcast licensee a legal duty to prevent broadcast on his facilities of comment containing defamation or falsehood?* [Emphasis supplied.]

Approaching the question of broadcast content the Commission said:

> The issue presented here is not whether the broadcasts in question were proper, *or were false and defamatory,* or were anti-Semitic, or were in the public interest. Although these issues are of greatest interest to the parties, lend themselves to the most dramatic and forceful statements and may attract the most attention, they are not legal issues that are properly before the Commission in this proceeding. The Commission cannot put such matters in issue without becoming the censor of broadcasting, which it is forbidden to do. If the Commission were to undertake to judge in this proceeding that certain broadcasts are *false, defamatory,* and anti-Semitic, and therefore contrary to the public interest, it would soon be called upon to make similar judgments that other broadcasts are false and defamatory to Negroes, to Socialists, to Catholics, to pacifists, to militarists, and eventually to the members of every ethnic, religious, and political grouping. [Emphasis supplied.]

Then, describing licensee duty in such circumstances, the Opinion continued:

> In broadcasting it is required that controverted or controversial matters be subject to fair and adequate opportunities for reply by those of differing viewpoints. The details of this doctrine are discussed in other Commission statements and are not in issue here. In this case it is plain that the licensee has offered and has affirmed his intention to continue to offer fair and reasonable opportunity for the expression of conflicting and opposing viewpoints to

> those of the broadcasts complained of. This is all that the law requires. *We cannot make the right to a license renewal dependent on our judgment as to whether the assailed broadcasts were in themselves false and defamatory or not. Near* v. *Minnesota,* 283 U.S. 697 (1931). We do not hold that the broadcasts, or any similar broadcasts, were in the public interest, but rather that it is in the public interest to have free speech on all subjects on licensed broadcast facilities provided only that all viewpoints are afforded a fair and equal opportunity for expression. [Emphasis supplied.]

Following the initial order, ADL filed a petition for reconsideration. There it urged licensees should have the duty, in the public interest, to investigate and verify the correctness of material broadcast by them. The licensee, in turn, contended he was in no position to judge the accuracy of Cotten's statements and "could not set himself up as a censor." Discussing the issue, the Commission, in its order of January 18, 1967,[36] denying ADL's petition for renewal, said:

> * * * Faced with possible harassment which includes loss of license at renewal, licensees, under the verification approach urged by ADL, might well seek to avoid presentation of controversial issue programming. This would be expecially true of the smaller broadcast outlet, where the cost and time consumed in the verification process would constitute a considerable deterrent. Thus, were we to follow this course, we would be significantly inhibiting debate on controversial issues and at the least rendering such debate "less robust and less wide-open."

Commission Kenneth A. Cox voted against the majority and filed scathing dissents to both orders. Concluding his first dissent, he said:

> I have limited my holding to the facts of this case, and so presumably has the majority. But even as so limited, let no one be deceived as to the importance of the action taken by the majority. It is, in the circumstances, a major step away from the concept of licensee responsibility so central to the scheme of the act. In light of the history of the word in our century, these programs stand as a bald attack upon the lives, the fortunes, and the sacred honor of millions of our fellow countrymen. The Communications Act does not permit a grant without hearing when substantial public interest questions are raised. I dissent from the grant of a renewal of licensee to station KTYM and vote to set the renewal application for a hearing.

Whether one agrees or disagrees with Commissioner Cox upon the merits, his conclusion that KTYM was a "major step" in the regulatory history for broadcasting cannot be challenged.

The decision clearly overturned and reversed the action of FRC in the *Shuler* case where the certain issue was, as here, the broadcast of false, misleading, and defamatory materials. Yet, that the Commission would rule as it did in KTYM is not surprising. As noted from the 1960 programing report, the Commission had im-

plicitly stated, except for advertising, licensees have no responsibility, in the public interest, to exclude false and misleading material from their broadcasts. This is the explicit holding in KTYM.

When the Commission asserts, as it did in KTYM, that it is powerless to consider whether past program content is in the public interest, it is announcing a landmark position it is a postition at variance with many of its past pronouncements and with far-reaching implications for the future. Except for the fairness doctrine, the Commission seems to conclude it has no power under the law to scrutinize a licensee's past programing content.

Some serious new questions arise inferentially from KTYM. The Commission held licensees have no duty to verify the accuracy or veracity of programs produced and offered for broadcast by another. No doubt, as a practical matter, it is not feasible for any licensee to audition and verify content of every public-issue broadcast he carries. In some instances involving network programs it is impossible for him to do so. Yet, beginning with the *Shaeffer* case, it has been consistently held that he is individually responsible for all his broadcast content. From that responsibility has arisen a duty which FCC has repeatedly held to be nondelegable.

How does KTYM affect the definition of that responsibility? Does it still exist? If it does, has FCC newly recognized varying degrees of that responsibility? To deal with these questions, let us turn to a hypothetical case which KTYM suggests.

Assume Richard Cotten had been licensee of KTYM. Let licensee himself be the author and purveyor of false, misleading, and defamatory broadcasts. The practical problems of verification do not prevail here. It is licensee's own invention which arouses complaint. Would the offensive material be viewed in the same light by the Commission majority? One can only wonder. Yet, in such a case, there seems to be only two alternatives open to FCC.

Adopting one alternative, the Commission could rule, as in KTYM, that it has no power apart from the "fairness doctrine," to determine whether past licensee broadcasts were in the public interest. Necessarily it would hold it could not inquire about the content of licensee's own broadcast materials and, therefore, could not censure him for past false, misleading, and defamatory broadcast statements. In such a case, any FCC assertion that licensee is responsible for all his broadcast content would merely be a restatement of licensee's obligation to respond for civil damages or criminal prosecution, quite apart from any regulatory sanction.

Admitting the other alternative, FCC would hold it, indeed, has the power to determine if licensee's own past utterances met a standard of public interest. Further, he may not include false, defamatory, or misleading materials in broadcasts developed and produced by him. As distinguished from programs produced by others, broadcasts in which he is "personally involved" are subjected to a higher standard of verification than required in KTYM.

If this alternative is adopted, FCC must depart from past rulings and make new law. One need only refer to the letter of September 18, 1963, addressed to Douglas A. Anello, for this to become crystal clear. There the Commission stated "personal involvement" was not justification for a higher standard of duty and, conversely, the same high standard of licensee responsibility applies to all broad-

cast content alike. Of course, the first case in point, *Shaeffer,* would be necessarily overruled.

Another regulatory ambiguity springs from KTYM. The offending Cotten broadcasts were admittably irresponsible. The Commission expressly found them to be so. Hence, offending *irresponsible* broadcasts are not inimical to the public interests as long as a reasonable opportunity for response is afforded upon demanded by *responsible* members of the public. However irresponsible the original assertion, the reply must be made by a responsible person.

KTYM leaves us with a final question. If FCC is powerless to determine that false, misleading, and defamatory broadcast materials are not in the public interest, by what authority may it proscribe against false, misleading and deceptive advertising as it did in the 1960 programing report?

In this chronology of the substantive development of fairness regulation, from earliest FRC pronouncements to *KTYM,* until the latter case and excepting the erratic *Mayflower* interlude, the doctrine evolved rather logically in a growing body of precedent. Against that background, KTYM cannot help but jar. *KTYM* and *Shuler* simply cannot be reconciled. They are 36 years and 180 degrees apart. Nostalgically, one cannot help but speculate what the Federal Radio Commission would have done with KTYM. On the other hand, one cannot help but wonder what broadcasting would be like today if the KTYM decision contained the name Shuler instead of Cotten and had been decided, otherwise verbatim, in 1931.

Clearly the Commission has changed its outlook in those 36 years. One might wonder if the Court of Appeals for the District of Columbia has also. We shall have an opportunity to see. ADL has appealed the Commission's final order to that court which, as in the *Shuler* case years before, must decide if the Commission's action was in the public interest, convenience, or necessity.

Before leaving this chronology, one final case must be reviewed. It revives the problem facing FCC when it considered the complaint of Rev. Sam Morris against KRLD and CBS in March of 1946. Specifically, should the "fairness doctrine" apply to a broadcast announcement advocating the purchase of a commercial product?

A complaint dated January 5, 1967, was lodged with FCC against WCBS–TV, New York. It cited "numerous commercial advertisements for cigarette manufacturers," mentioned three such commercials specifically which presented the point of view that smoking is "socially acceptable and desirable, manly, and a necessary part of a rich full life," and alleged that the station had not afforded complainant or another responsible spokesman the opportunity "to present contrasting views on the issue of the benefits and advisability of smoking." Complainant argued such programs as had been offered by WCBS–TV on smoking and health were insufficient to offset the volume of cigarette commercials it carried and contended that free time, roughly approximating that devoted to smoking commercials, should be made available to responsible groups for presentation of the opposing view.

The complaint was resolved on June 2, 1967, when FCC addressed a letter to the station.[37] Holding the doctrine applicable to cigarette commercials, the Commission's decision was philosophi-

cally consistent with the *Morris* case. While KRLD and CBS were exonerated for a sin common to all broadcasters in *Morris,* the latter decision devolved a new responsibility upon the entire industry while not specifically being critical of WCBS–TV. Notably the recent decision was specifically limited to one product, cigarettes. While rejecting the position that licensees should afford free reply time roughly approximating that devoted to cigarette commercials, the Commission described licensee responsibility in seemingly new terms. The broadcaster who carries cigarette commercials is required "to provide *a significant amount of time* for the other viewpoint." [Emphasis supplied.]

No definition of the phase, "a significant amount of time," was undertaken. Rather, broad discretion in determining the adequacy of response was left with the individual licensee. Discussing this point, the Commission said:

> A station might, for example, reasonably determine that the above noted responsibility would be discharged by presenting each week, in addition to appropriate news reports or other programing dealing with the subject, a number of the public service announcements of the American Cancer Society or HEW in this field. We stress, however, that in this, as in other areas under the fairness doctrine, the type of programing and the amount and nature of time to be afforded is a matter for the good faith, reasonable judgment of the licensee, upon the particular facts of his situation.

Moreover, it was clear FCC would be satisfied with reply time significantly short of equaling time devoted to the offending commercials. On that point, the Commission said:

> * * * The fairness doctrine does not require "equal time" * * * and, equally important, a requirement of such "rough approximation" would, we think, be inconsistent with the congressional direction in this field—the 1965 Cigarette Labeling and Advertising Act. The practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising. But in the 1965 act Congress made clear that it did not favor a "drastic" step * * *

Although limited in application to cigarette commercials and justified largely because of congressional, Government, and private research findings and concern in recent years about the health consequences of cigarette smoking, the decision portends fairness problems with broadcast advertisements yet to come. The product involved in *Morris,* alcoholic beverages, is the first which comes to mind. Philosophically, the recent decision, taken with *Morris,* might logically be extended to cover a multitude of other products and services.

Dentists are quite reasonably concerned about the effect of sugar-laden confections upon dental health, particularly among children. Should candy, gum, and soft beverage commercials be embraced by the "fairness doctrine"? On the opposite extreme, there

is a militant, organized, and vocal minority whose opposition to the artificial interdiction of fluorides for dental hygiene approaches religious zeal. Their complaints have faced the Commission in the past arising from local ballot measures or other governmental action for fluoridation of water supplies. While holding broadcasters must afford their views opportunity for hearing, FCC has recognized them as a responsible element of the community. Is it illogical to assume thay may object just as vehemently and responsibly to fluoride toothpastes which have become so popular in recent years?

Another minority, not necessarily mutually exclusive, is determined that a substantial number of society's problems would be obviated if all consumed only "natural foods." Saturated fats are linked with heart disease. Firearms and ammunitions arouse the passion of others, both pro and con. Among those lawfully licensed to practice the medical arts are some who oppose ingestion of medications of any sort, while their opposites may fervently believe them to be "cultists" whose very existence constitutes a threat to public health. Religious beliefs mitigate against other products and services. Adopting the philosophy of *Morris* and *WCBS-TV*, just how far may the "fairness doctrine" be extended to embrace broadcast announcements favoring commercial products and services? [38]

II. Enforcing the Fairness Doctrine

A. SANCTIONS

The Communications Act affords FCC a variety of flexible sanctions in dealing with licensees who do not operate in the public interest, convenience, or necessity. The most extreme of these are license revocation and nonrenewal of license. Lesser administrative sanctions include: cease and desist orders, forfeitures, and short-term probationary renewals.

The Commission is also authorized by the act to make rules and regulations. In that connection, section 4(i) provides:

> (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions.

The above language is permissive. "The Commission *may* * * * make such rules * * *," etc. [Emphasis supplied.] Section 303 is more obligatory. It states:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires *shall*—* * *
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * * [Emphasis supplied.]

License revocation, the most drastic of sanctions, is authorized by section 312 of the act, which also authorizes cease and desist orders. That section reads in part as follows:

SEC. 312. (a) The Commission may revoke any station license or construction permit—

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of section 1304, 1343, or 1464 of title 18 of the United States Code.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

Six grounds for revocation are listed, including willful or repeated violation or failure to observe any provision of the act of any Commission rule or regulation and willful or repeated failure to operate substantially as set forth in the license. These grounds also obtain for the issuance of a cease-and-desist order, except, in that instance, the violation does not have to be willful or repeated.

Section 503 of the act authorizes FCC to exact administrative forfeitures in some instances. Paragraph (b) of that section reads as follows:

(b)(1) Any licensee or permittee of a broadcast station who—

(A) willfully or repeatedly fails to operate such station substantially as set forth in his license or permit,

(B) willfully or repeatedly fails to observe any of the provisions of this Act or of any rule or regulation of the Commission prescribed under authority of this Act or under authority of any treaty ratified by the United States,

(C) fails to observe any final cease and desist order issued by the Commission,

(D) violates section 317(c) or section 509(a)(4) of this Act, or

(E) violates section 1304, 1343, or 1464 of title 18 of the United States Code,

> shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this Act.

As with revocation, willful or repeated failure to observe any provision of the act or of any Commission rule or regulation or willful or repeated failure to operate a station substantially as set forth in the license are grounds for invoking forfeiture.

Finally, there are two sanctions available to the Commission while acting upon applications for renewal; nonrenewal and short-term probationary renewal.

Currently, broadcast stations are licensed to operate for a maximum period of 3 years. Shortly before expiration of the license period, each licensee wishing to retain his broadcasting privilege must file an application for renewal of license before the Commission. Before granting a renewal of license, FCC is required by the Communications Act to affirmatively determine that continued operation of the station will serve the public interest, convenience, or necessity.

In that determination, FCC has asserted, among other things, that it takes into account the station's past perfomance and its promises for future performance.[39] If, while meeting other requirements, licensee statisfies the Commission that his past operation and proposals for the future meet the standard of public interest, convenience, or necessity, his license is renewed for a full 3-year term. If, on the other hand, the Commission is not satisfied, it may do one of two things. It may deny the renewal, after hearing, and terminate licensee's privilege to broadcast. Or, if it deems the station's past performance substandard, it may grant a probationary renewal of license for any term it chooses short of 3 years. In such circumstance, the station is advised of its past deficiency and subsequent renewal is conditioned that the deficiency be corrected during the probationary term.

That short-term renewal as authorized by the act is apparent from the following language appearing in section 307(d):

> Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period of periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action.

Until July 5, 1967, FCC had never adopted the "fairness doctrine" or any of its features as a Commission rule. By its memorandum opinion and order of that date,[40] it elevated the personal-attack feature to the status of rule. The text of the rule follows:

> In Part 73 §§ 73.123 73.300, 73.598, and 73.679 all to read identically are added to read as follows:
>
> Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups of foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesman, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

Note: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, Section 315(a) of the Act (47 U.S.C. 315(a)); Public Notice: *Applicability of the Fairness Doctrine in the handing of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The rule incorporates the personal-attack feature of the doctrine and its *Times-Mirror* extension essentially as it had stood before, with three notable exceptions. First, under previous rulings a licensee was required to notify the person attacked or candidate before or at the time of the involved broadcast, tendering script, tape, or summary and an offer of time for response. Under the new rule the notice and tender shall be made within a "reasonable time," but not later than 1 week after the attack. Second, previous rulings had not clarified licensee, obligations following personal attacks by candidates, their authorized spokesmen, or those associated with them in the campaign upon other such candidates, the authorized spokesmen, or those associated with them in the campaign.

The third exception applies to the *Times-Mirror* extension and involves one substantive change and two procedural ones. Under previous rulings a licensee was obligated to notify candidates and tender script and response time when he permitted "the use of his facilities by a commentator or any person other than a candidate to take a partisan position on the issues involved in a contest for political office or to attack one candidate or support another by direct or indirect identification * * *." The new rule imposes this obligation only in connection with licensee editorials. It is not clear from the opinion that the older features have either been repealed or abandoned. Implicitly, this seems to be the case. The attendant confusion can only be clarified by future FCC decisions.

The procedural changes involve the time of notice and tender. When involved editorials are broadcast more than 72 hours prior to the day of election, the offer and tender must be made within 24 hours following the editorial broadcast. When the editorial is broadcast within 72 hours prior to election day "the licensee shall comply * * * sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion." [41]

Although no part of the "fairness doctrine" had been committed to rule before July 5, 1967, we think FCC was authorized theretofore and, with respect to that portion of the doctrine not adopted as rule, is authorized hereafter to invoke revocation, cease-and-desist orders, and forfeitures against appropriate fairness violations. This is urged upon two grounds: First, fairness violations are a failure to observe a provision of the Communications Act, and second, fairness violations constitute a theoretical failure to operate the station substantially as set forth in the license.

Taking up the first ground, the following language from section 315(a) should be recalled:

> * * * Nothing in the foregoing sentence shall be construed as relieving broadcasters * * * from the obligation to operate in the public interest *and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.* [Emphasis supplied.]

Thus, the fairness obligation of broadcast licensees became an explicit provision of the act, at least to the extent applicable to broadcasts exempted from operation of section 315.

Upon the second, a representation said to be required of all licensees in the renewal application should be pointed out. The application form elicits the applicant's practices affecting public affairs programing. He must describe his past and proposed policies "with respect to making time available for the discussion of public issues and the method of selecting subjects and participants." Officials at FCC claim it requires that each response demonstrate an awareness of and compliance with the "fairness doctrine." Thus, each applicant must, in accordance with FCC policy, affirmatively represent in his renewal application that he has and will comply with the doctrine.

In that same connection, the license form currently being issued by the Commission contains the following language:

> * * * This license is issued on the licensee's representation that the statements contained in licensee's application are true and *that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith.* The licensee shall during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privilege herein conferred. [Emphasis supplied.]

Hence, the license incorporates by reference representations of each renewal application for future operation of the station. Therefore, any subsequent bad-faith "fairness doctrine" violation represents a failure by licensee to carry out undertakings contained in his application, assuming his response conforms with FCC policy, and, consequently, is a failure to operate his station substantially as set forth in the license.

In summary, Congress has made available to FCC varied and flexible administrative sanctions for enforcing "fairness doctrine" and other infractions by broadcast licensees. They range in severity from the "death penalty" of revocation or nonrenewal to a "slap on the wrist" evinced by cease-and-desist orders. Between these extremes, in a declining order of severity, are the short-term renewal and forfeiture.

Armed with these flexible sanctions, how has FCC applied them to "fairness doctrine" violations? To elicit an answer, the following questions were addressed to Chairman Hyde:

(1) How many stations in the history of FCC have had licenses revoked because of "fairness doctrine" violations?

(2) How many licenses have not been renewed because of "fairness doctrine" violations?

(3) How many cease-and-desist orders have there been issued for "fairness doctrine" violations?

(4) How many forfeitures have there been levied for "fairness doctrine" violations?

(5) How many short-term probationary renewals have there been granted because of "fairness doctrine" violations?

John F. Cushman, administrative assistant to Chairman Hyde, responded by letter dated May 3, 1967. In its entire history, he advised, FCC, for "fairness doctrine" violations, has never revoked a license, has never denied a license renewal, has never issued a cease-and-desist order, and has never levied a forfeiture. According to Mr. Cushman, the only sanction ever imposed for "fairness doctrine" violations was the short-term probationary renewal and it against only two licensees. Those renewals, both dated May 19, 1965, involved station WLBT and stations WJDX-AM and FM, all located in Jackson, Miss. As a practical matter, only one licensee was involved. WLBT was licensed to Lamar Life Broadcasting Co. and WJDX-AM and FM was licensed to Lamar Life Insurance Co. Although a separate corporate entity, the equitable ownership of Lamar Life Broadcasting Co. was vested in Lamar Life Insurance Co.

Of all the available sanctions, FCC, in its entire history, has elected to exercise only the short-term renewal to punish fairness violations. And it has used that sanction against only one licensee,

the owner of three stations. On the face of it, this history may be subject to two conclusions. If, over the years, a vigorous protection of the public interest has necessitated discipline of only one licensee for fairness infractions, then the broadcasting industry has demonstrated an enviable record of fair play. If such is the case, there must be something inherent in the industry which insures fairness and one is left to wonder if the "fairness doctrine," as a regulatory device, much less as a rule of the Commission is needed at all. On the other extreme the Commission's record might be constructed as one of excessive timidity in protecting the public interest, even abdication of the responsibility to do so.

FOOTNOTES

[4] *KFKB Broadcasting Assn., Inc.* v. *F.R.C.*, 47 F. (2d) at 672.
[5] KVEP, FRC docket 837.
[6] FRC docket 1043.
[7] An interesting footnote to human nature and the effect of Reverend Shuler on his community is recalled by the impact of one broadcast where he ascribed all manner of scurrilous activity to an unnamed prominent citizen. He threatened to reveal the name unless that person made a contribution of $100. Immediately following the broadcast several contributions of exactly that amount were received by the pastor.
[8] *Trinity Methodist Church, South* v. *F.R.C.*, 62 F (2d) 850.
[9] *Chicago Fed. of Labor* v. *F.R.C.*, 41 F. (2d) 422.
[10] It is interesting to note that Chicago Federation of Labor represented that WCFL served as the broadcasting agency of labor organizations. It contended, in view of the large membership and public importance of organized labor, they should be afforded a station of their own upon a desirable frequency without limitation on time of operation. That representation was remarkably close to practices forbidden by FRC, the private use of a frequency. WCFL was left to operate as before without chastisement on that ground. No doubt there were no serious complaints against the continued operation of the station under its old authority. From this we can conclude that the Commission, from its inception, has followed practices which prevail at this date. The continued operation of a station is jeopardized only if serious complaints is voiced at renewal time. No independent investigation of a station's program contest is undertaken by the Commission unless public complaints are lodged and then, only is extreme cases.
[11] * * * * *
[12] FCC docket 5618, *Mayflower Broadcasting Corp.*, Decision and Order, Jan. 17, 1941, 8 FCC 333.
[13] The station would not give its unequivocal promise never to editorialize, but merely represented it had no plans to resume.
[14] The trade press took little or no note of the decision. *Broadcasting* magazine, later to be one of the more strident voices raised against any FCC inhibition upon broadcast content, devoted little more than a column of its Jan. 20, 1941, issue to "Mayflower." Recapitulating the case and summarizing the decision, it took no editorial stand. Nor was it to give the matter any particular attention thereafter until 1946. It was not until 1946 that industry reaction began to surface. One can only summarize that, during the intervening period, broadcasters had no great desire to editorialize. Absorbed, as we were, with World War II, unanimity, rather than discord, was the order of the day. But the clamor that began in 1946 was to be heard far and wide and the phrase; "In brief, the broadcaster cannot be an advocate" was to galvanize the industry into mounting opposition until 1949.
[15] 10 FCC 515.
[16] Shortly after the decision, the Board of Directors of NAB on Aug. 7, 1945, adopted * * *
[17] * * * * *
[18] (Docket No. 7356) *WNBX Broadcasting Co.*, 12 FCC 837 at 841.
[19] * * * * *
[20] *In re Petition of Sam Morris*, 3 P. & E. Radio Reg. 154.
[21] *In re Petition of Robert Harold Scott*, 11 FCC 372.
[22] FCC docket 8516, *Editorializing by Broadcast Licenses*, 13 FCC 1.
[23] 6 P. & F.R.R. 258 (1950).
[24] "IBA Calls for Change in FCC Editorial Rule," *Broadcasting*, Oct. 27, 1958, at p. 71.
[25] FCC letter to KNOE, mineo 76175.
[26] *Lar Daly*, mimeo 85402, 19 P. & RR. 1103.
[27] 25 F.R. 7291.
[28] 23 P. & F. RR. 586.
[29] 23 P. & F. RR. 951.
[30] 24 U. & F. RR. 404.
[31] 24 P. & F. RR. 407
[32] FCC file No. 63-849.
[33] 29 F.R. 10415.
[34] 5 P. & F. RR. 2d 268.
[35] 4 FCC 2d 190.

[36] 6 FCC 2d 385.

[37] FCC file No. 67-641.

[38] On Sept. 8, 1967, FCC again considered the WCBS-TV case upon the petitions for reconsideration filed by several. The June 2 action was upheld and the Commission emphasized that the ruling applied only to cigarette advertisements. No mention of the *Morris* case appeared in the majority opinion.

[39] The "fairness doctrine" is brought to play in both these functions. Has the station complied with the doctrine in the past? Does it represent it will do so in the future? Thus, the "fairness doctrine" becomes a part of the overall and larger definition of "public convenience, interest, or necessity."

[40] FCC file No. 67-795, Docket No. 16574.

[41] On July 27, 1967, two petitions for review of the Commission's action in adopting the rule were filed. One, on behalf of CBS, was filed in the U.S. Court of Appeals for the Second Circuit, New York, N.Y. The other, on behalf of Radio Television News Directors Association, was filed in the U.S. Court of Appeals for the Seventh Circuit, Chicago, Ill. Both petitions seek to have the rule set aside upon the grounds that it violates the First amendment and section 326 of the Communications Act of 1934.

APPENDIX 2

FEDERAL COMMUNICATIONS COMMISSION

* * * * *

THE FAIRNESS DOCTRINE

How It Applies to Broadcasting and Cablecasting

(Public Notice of , 1981)

THE FAIRNESS DOCTRINE

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PART I -- INTRODUCTION

This booklet, which we call the Fairness Primer, has been prepared to explain the Fairness Doctrine in broadcasting. The Primer sets forth the general principles of the doctrine and gives examples of how it has been applied in actual cases. In the detailed discussion of the subject in Part III, you will see citations to FCC rulings and court decisions so that you may read their full texts if you wish to do so. Although the Primer is an accurate statement of broadcast law, the decisions we have summarized were reached in specific contexts and sometimes contained concurring and dissenting views. If you have a question about any interpretation given here, read the text of the case cited.

Explanatory note for laymen on citations of cases: The texts of most Commission rulings cited in the Primer will be found in the Federal Communications Commission Reports. The Reports begin with the first significant cases decided by the FCC in 1934, the year it was established. The Second Series of FCC Reports begins with cases decided in July 1965. The reports are available in the FCC library in Washington and in many law libraries throughout the country. Except for volumes now out of print, the reports may be bought from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The citation of a case as 30 FCC 133 (1961) means that the text of the document begins on page 133 of volume 30 of the first series and that the case was acted upon in 1961. Cases in the second series are cited as, for example, 11 FCC 2d 169 (1968). If the term "B/c Bur." precedes the date in a citation, this means the case was decided by the Commission's Broadcast Bureau pursuant to authority delegated to it by the Commission. A few cases may be cited which were not printed in the FCC Reports but were published by Pike & Fischer, a private publisher of FCC documents. These citations use the letters "R.R." instead of FCC, standing for "Pike & Fischer Radio Regulations." Some documents cited in this Primer have not been published in either series. They are available for inspection in the FCC Washington offices, or copies of them can be obtained for a fee from the firm authorized by the FCC to reproduce its public documents. These unpublished documents are cited either by the date issued or by a number such as FCC 78-150, which indicates that the document was No. 150 of those released in 1978. Citations of decisions of the U.S. Supreme Court and the U.S. Circuit Courts of Appeal also are given. Reports on the decisions of these courts may be found in law libraries and the FCC library in Washington.

A. HOW THE PRIMER IS ORGANIZED

Part I of the Fairness Primer is the introduction. It contains a short history of the Fairness Doctrine and tells how and where to send complaints or questions. It also includes a copy of Section 315 of the Communications Act of 1934, as amended, in which Congress gave formal recognition to the Fairness Doctrine.

Part II is a general summary of the Fairness Doctrine, written in language that we hope is understandable to the general public.

Part III is a detailed explanation of all aspects of the subject. It cites scores of court decisions and Commission rulings and policy statements.

The Appendix gives the Commission's rules on two aspects of the Fairness Doctrine--personal attacks and political editorials--and the fairness rule for cablecasts.

There also is an index.

This Fairness Primer summarizes many important rulings, policy statements and court decisions which have been made since the last Primer was published. To the extent that there are differences between the two primers, the present Primer supersedes the last one and represents the present state of the law.

While this Primer is intended to serve as a useful summary of and a guide to licensees' Fairness Doctrine obligations, it is not a Commission ruling with the force of law and should not be cited as legal precedent. Citations should be to the specific decisions referenced herein.

One further word of explanation. Although the Fairness Doctrine applies to origination cablecasting 1/ as well as to broadcasting, we usually refer in this Primer only to broadcasting.

1/ That is, the cable fairness rule applies to programming subject to the editorial control of the cable operator and does not include cable transmission of the programming of TV broadcast stations. There are certain presently unresolved issues concerning the application of the Fairness Doctrine to cablecasting. We shall not attempt to resolve those issues in this Primer; for a discussion, see Simmons, "The Fairness Doctrine and Cable TV," 11 Harvard Journal on Legislation 699 (1974).

B. A BRIEF HISTORY OF THE FAIRNESS DOCTRINE

In order to place the Fairness Doctrine in perspective in the history of broadcast regulation, we are presenting in this section a brief summary of its origin and development.

The basic principles of the Fairness Doctrine date back to the early days of the Federal Radio Commission which regulated broadcasting from 1927 until the Federal Communications Commission was established in 1934. The Radio Act of 1927 authorized the Federal Radio Commission to license a broadcasting station only if the FRC found that "the public interest, convenience or necessity" would be served by doing so. On the basis of this requirement that stations serve the public interest, the FRC ruled that broadcasting stations must present contrasting views on controversial public issues. In one of the landmark cases in radio regulation (the Great Lakes Broadcasting Co. case) the Radio Commission stated, as reported in its Third Annual Report:

> It would not be fair, indeed, it would not be good service, to the public to allow a one-sided presentation of the political issues of a campaign. Insofar as a program consists of a discussion of public questions, the public interest requires ample play for the free and fair competition of opposing views, and the Commission believes that the principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public.

FCC Reaffirms Fairness Principles

The Federal Communications Commission reaffirmed the fairness principles adopted by its predecessor agency. For example, in its Sixth Annual Report, issued in 1940, the FCC stated at p. 55:

> In carrying out the obligation to render a public service, stations are required to furnish well-rounded rather than one-sided discussions of public questions.

The FCC restated the fairness obligation in a number of cases during the 1940's. After an extensive inquiry into the subject, it set forth the doctrine in substantially its present form in the Commission's 1949 Report on Editorializing by Broadcast Licensees. In that document, the Commission stated, among other things, that: (a) the broadcaster is "a trustee for the public at large"; (b) he has "an affirmative responsibility to provide a reasonable amount of time for the presentation ... of programs devoted to the discussion and consideration of public issues"; (c) the broadcaster's obligation to serve the public interest goes beyond agreeing to broadcast opposing views only if someone demands that they be broadcast. Instead, the Commission said:

> ... broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, over and beyond their obligation to make available upon demand opportunities for the expression of opposing views. It is clear that any approximation of fairness in the presentation of any controversy will be difficult if not impossible of achievement unless the licensee plays a conscious and positive role in bringing about balanced presentation of opposing viewpoints.

The Commission explained, however, that the broadcasters themselves were to decide "what subjects should be considered, the particular formats of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokespersons for each point of view." One exception to the broadcaster's freedom to choose the spokespersons was mentioned: when a person or group had been specifically attacked over a station, fairness might require that time be allocated to that person or group.

In 1959, Congress gave statutory authority to the Fairness Doctrine. In amending Section 315(a) of the Communications Act, it affirmed "the obligation imposed upon [broadcasters] under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Doctrine Clarified In Cases Since 1949

The Fairness Doctrine as administered today represents the same basic principles laid down in the 1949 Editorializing Report. Actions taken by the Commission and the courts since the Report have served largely to clarify and interpret it in specific cases. Thus, in the Cullman case in 1963, the Commission considered the question of stations that have been paid to broadcast one side of a controversial public issue. Are they justified in refusing to present contrasting viewpoints unless someone pays them to do so? The Commission ruled that since the element of greatest importance is "the right of the public to be informed," a station may not refuse to broadcast contrasting views on an issue merely because no one pays it to do so.

In 1967, the Commission adopted two rules further interpreting the Fairness Doctrine. They are the rules on personal attacks and political editorializing, which are reprinted in the Appendix to this Primer.

In that same year, 1967, the Commission applied the Fairness Doctrine to the normal advertising of a commercial product--cigarettes--principally because cigarette advertising had been found by the U.S. Government to be hazardous to health. The Commission said that the cigarette situation was unique and that it did not know of any other commercial product that the public interest would require to be treated in the same way. The U.S. Circuit Court of Appeals for the District of Columbia Circuit affirmed the Commission's ruling, but a few years later it held that if the Fairness Doctrine were applied to cigarette advertising, it also must be applied to the advertising of large cars and leaded gasoline on the grounds that both products pollute the atmosphere. Subsequently, the Commission ruled that no advertisements for commercial products or services which merely promoted the sale of the product or service would thereafter be considered to fall within the scope of the Fairness Doctrine.

In 1969, the U.S. Supreme Court upheld the constitutionality of the personal attack rule and the Fairness Doctrine generally in the Red Lion Broadcasting Co. case. The court affirmed the twofold Fairness Doctrine obligation to give adequate coverage to important public issues and to present contrasting views on these issues.

The Commission issued a number of major rulings in the early 1970's that further clarified the application of the Fairness Doctrine. In the so-called BEM case, it ruled that the law does not compel a broadcasting station to sell spot announcements for the discussion of controversial issues, although it may do so if it wishes. In three other cases, it held that armed forces recruiting announcements which made no mention of any controversial issue did not require stations to present contrasting views. In still another case, it refused to apply the Fairness Doctrine to advertisements which merely sang the praises of a particular brand of gasoline. However, when an oil company bought ads which presented one side of the then current public controversy over developing and transporting Alaskan oil, the Commission held that the Fairness Doctrine applied to the spots.

Fairness Doctrine Re-Examined in Inquiry

By 1971, so much controversy had arisen about applying the Fairness Doctrine and so many proposals had been made for modifying it that the Commission decided to make a broad-ranging inquiry into "the efficacy of the Fairness Doctrine and related public interest policies." It noted that almost 22 years had passed since it had made a full study of the doctrine and stated that the time had come for a reassessment and clarification of the basic policy. Written comments were solicited from all interested persons. Panel discussions and oral arguments on all aspects of the doctrine were conducted before the entire Commission. The final result was a review and restatement of the doctrine which was issued in 1974. In this document, popularly known as the Fairness Report, the Commission reexamined all aspects of the doctrine and all proposals for revising it, and clarified its interpretation of the doctrine on many points. Basically, it reaffirmed the doctrine as originally set forth in the Editorializing Report, and as it had evolved in rulings by the Commission and decisions of the courts since that time. Different portions of the Fairness Report as they apply to individual aspects of the doctrine are discussed at length in Part III of this Primer.

Because it considers administration of the Fairness Doctrine so important, the Commission has delegated concurrent responsibility to two major units of its staff to rule on complaints at the staff level and to make recommendations to the Commission on cases that go to it for decision. They are the Broadcast Bureau and the Office of General Counsel. Generally, the Broadcast Bureau issues the staff rulings with the concurrence of the Office of General Counsel.

C. HOW TO FILE A COMPLAINT

No special form is needed for filing a complaint based on the Fairness Doctrine, but a great deal of time will be saved if you follow closely the instructions given in this section. If your complaint does not contain all of the information listed below, you will be asked to supply the additional information, and your complaint cannot be processed until this information is received.

Before complaining to the FCC, contact the station that you believe is at fault. We encourage you to negotiate with the broadcaster, and have found that many problems can be settled in this way without our intervention. If dealing with the station does not resolve your complaint, write to the Commission, enclosing copies or summaries of the complaint you made to the station and its reply. When you file your complaint with the Commission, send a copy to the station. The complainant and the station should continue to send copies to each other of all correspondence between them and the Commission, thus saving time in settling the complaint.

Your complaint to the FCC must include the following information:

(a) Your name, address and telephone number.

(b) The call letters or name of the station or network that you believe has violated the law.

(c) The date(s) and time(s) of the program(s) that caused you to complain.

(d) The specific controversial issue of public importance 1/ that was presented, and why you believe it was such an issue. Also give a summary of the views expressed about it on the program.

(e) The reasons why you believe the station or network has presented only one side of the controversial issue in its overall programming and has no plans for presenting contrasting viewpoints on the issue in the future. 2/

(f) If your complaint is that a station has broadcast no discussion of either side of a controversial issue that you believe is of such great importance that the public interest requires it to be broadcast, explain your reasons for believing that the station has carried no discussion of the subject and why you believe the subject is of great importance in the area served by the station. 3/

For a more detailed discussion of what must be included in a complaint, see Part III, Section E of this Primer.

1/ See Section C of Part III for an explanation of what a controversial issue of public importance is.

2/ See Section D of Part III for a discussion of what a station must do in trying to present contrasting views on a controversial issue. See Section E of Part III for an explanation of the information you must furnish to support your belief that the station has presented only one side of the issue.

3/ As explained in Parts II and III of this Primer, the broadcaster is allowed wide discretion in choosing the controversial public issues to cover in his or her programming. See Section C of Part III for a detailed discussion of how much latitude is allowed broadcasters in deciding what issues to cover.

D. WHERE TO SEND COMPLAINTS AND INQUIRIES

If your fairness complaint or inquiry concerns a broadcasting station or network, write to:

Fairness/Political Broadcasting Branch
Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

If your complaint or inquiry is about a cable system, write to:

Policy Review and Development Division
Cable Television Bureau
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Make your complaint in writing unless there is not enough time to use the mails; for example, if your complaint concerns the vote on a referendum that will take place in a few days. In that kind of a situation, you can discuss your complaint with the Commission's staff by placing a telephone call to (202) 632-7586, the Fairness/Political Broadcasting Branch of the Complaints and Compliance Division. If your complaint or question is about a cable origination, call (202) 632-6468. If you telephone, please be ready to state all of the essential facts of the case as set forth in Section C above.

E. SECTION 315 OF THE COMMUNICATIONS ACT

The obligation to treat issues fairly appears in Section 315 of the Communications Act of 1934 particularly the last sentence of subsection (a). The text of Section 315 follows:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any--

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed--

(1) during the 45 days preceding the date of a primary or primary runoff election and during the 60 days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

(c) For purposes of this section--

(1) the term "broadcasting station" includes a community antenna television system; and

(2) the terms "licensee" and "station licensee" when used with respect to a community antenna television system mean the operator of such system.

(d) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

PART II — GENERAL SUMMARY OF THE FAIRNESS DOCTRINE

This part of the Primer is a summary of the Fairness Doctrine in layman's language. It is for general information rather than legal reference purposes. Part III below discusses the Fairness Doctrine in detail, explains how it is applied to specific factual situations, and cites the statutes, rules, court decisions and Commission rulings which give Part III legal authority.

A. DOCTRINE CALLS FOR "REASONABLE OPPORTUNITY" — NOT "EQUAL TIME."

The Fairness Doctrine does not require the "equal opportunities" or so-called "equal time" that a station must grant to political candidates. 1/ Instead, it calls for "reasonable opportunity" for conflicting views on important controversial public issues. More specifically, it requires that a station:

(a) broadcast discussion of the most important controversial issues in the station's coverage area;

(b) try to present contrasting views on these issues.

The broadcaster itself is given the authority to decide:

(a) how much air time to devote to controversial issues;

1/ For the law on broadcasts by candidates, see The Law of Political Broadcasting and Cablecasting, 69 FCC 2d 2209 (1978).

(b) which issues are the most important in the station's area;

(c) what the significant contrasting views are on these issues;

(d) the types of programs in which the various viewpoints will be presented and the date and time when each viewpoint will be broadcast;

(e) the best spokesperson to present each viewpoint.

The FCC will not intervene in any of these decisions unless it has strong evidence that the broadcaster acted unreasonably or in bad faith. Even though the Commission might have decided a fairness question differently if it had been the broadcaster making the original decision, it will not overturn the licensee's decision if it seems to have been within reason and made in good faith.

Since the Fairness Doctrine does not require "equal time," all the broadcaster need do after presenting one side of an issue is to encourage the presentation of contrasting views on it and provide a reasonable opportunity for their broadcast. The conflicting views on an issue need not be broadcast on the same program or even the same series of programs, provided that the broadcaster tries to present them fairly somewhere in its schedule.

B. SCOPE OF FAIRNESS DOCTRINE

The Fairness Doctrine applies to all types of programs 1/--not only station editorials, speeches, debates, panel discussions and news programs, but interviews, public service announcements, commercial announcements, and entertainment and religious programs. Although the Commission has never applied the doctrine to prayers, devotionals or regular church services, the doctrine applies to religious programs that advocate one side of a controversial public issue on a social, political or economic matter and those that contain personal attacks.

1/ Except "uses" of stations by political candidates. See Part III, Section G.

C. PURPOSE OF THE DOCTRINE; ITS LIMITATIONS

The purpose of the Fairness Doctrine is to bring about robust, wide-open debate on the vital public issues of the day so that the American people will be informed about the opposing views on these subjects and be able to make intelligent use of their rights as citizens in a democracy.

However, we should explain at this point that the Fairness Doctrine does not guarantee exact "fairness" in the sense in which some persons would interpret that word--that is, require that both sides of an issue be broadcast on the same program and that exactly equal amounts of time be given to each side. In theory, this might be the ideal way to assure fairness, but in reality it would often discourage or even prevent broadcasts about controversial issues because of the difficulty in presenting contrasting views on an issue on the same broadcast or in exactly equal time periods. For example, a station may receive over the news wires a newsworthy statement by a public official advocating or opposing one side of an important public issue. The news editor knows that the station's listeners would want to learn about this statement on the next newscast. However, when time for the newscast arrives, no one has spoken up with a contrasting view on the issue. Exact "fairness" would prevent broadcast of the news item, no matter how important it might be, until a contrasting viewpoint could be obtained. For the same reason, a station could not carry a live broadcast of a press conference by the President or any other public figure because he might express views on a controversial issue. The same restriction would apply to "Meet the Press" type interview programs and all "open mike" programs, since a caller might volunteer a view on a controversial subject.

The FCC believes the public will be better informed in the long run if the Commission does not insist on this kind of exact "fairness," but simply requires the broadcaster to try to present conflicting viewpoints somewhere in its schedule, even though all of the listeners who heard the broadcast of one side of an issue may not be tuned in when the other side is presented. The FCC believes it should not try to force licensees to any single, preconceived notion of what constitutes the "ideal" in broadcast journalism but instead should merely establish general guidelines concerning minimal standards of fairness.

D. STATIONS MUST CARRY DISCUSSION OF MAJOR ISSUES

The first part of the fairness obligation is to broadcast discussion of what the broadcaster believes are the most important public issues in the area served by a station. The FCC has allocated so much space in the crowded electromagnetic spectrum to broadcasting mainly because of the great contribution which broadcasting can make to an informed public opinion on the vital public issues of the day. Therefore, it expects broadcasters to devote a substantial amount of program time to discussion of public issues, although the exact amount is left to the judgment of the broadcaster.

The broadcaster also is responsible for deciding what public issues in its area are important enough to justify coverage. Although the broadcaster has wide latitude in making such judgments, the Commission says that some issues are so critical or of such great importance that it would be unreasonable for a licensee to ignore them completely. In one case, a station in the heart of the coal-mining country where strip mining was a major controversial issue was told by the Commission that it had acted unreasonably in failing to broadcast discussion of the issue. However, such cases have rarely arisen, and the Commission has said that licensees are not obligated to address each and every important issue.

E. NEED NOT SELL TIME FOR CONTROVERSIAL ISSUES

A station is not required to sell time for discussion of controversial public issues, although it may do so if it wishes. In affirming a Commission discussion that a broadcaster need not sell time for this purpose, the U.S. Supreme Court cited two major reasons: (1) a system of compulsory sale of time would be "heavily weighted in favor of the financially affluent"; (2) the present policy of allowing the station licensee to make the decisions on allocating time for presentation of issues and choosing the spokespersons for contrasting views gives the public some assurance that the broadcaster will be answerable if it fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view.

There are two exceptions to the policy of not requiring sale of time for discussion of controversial issues. One deals with solicitation of funds by major political parties. The Commission says licensees should not adopt a policy of refusing to sell time to "significant political parties for the solicitation of funds." The other exception may sometimes arise under the "equal opportunities" law of Section 315 of the Communications Act or the "reasonable access" requirement of Section 312(a)(7) of the Act. If a station chooses to sell time to one candidate for an office, it must sell time to that candidate's opponents if they make requests to buy it within seven days. For discussion of this in detail, see the Commission's Primer on The Law of Political Broadcasting and Cablecasting.

F. NO PARTICULAR PERSON IS ENTITLED TO RESPOND

As pointed out in Section A above, it is the broadcaster who chooses the spokespersons for the contrasting viewpoints on an issue, and no particular person or group is entitled to respond. There are two exceptions to this policy as explained in Sections L and M below, which deal respectively with personal attacks and political editorials.

G. WHAT IS A CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE?

Since the Fairness Doctrine deals solely with controversial issues of public importance, it would be most helpful if we could give the reader an exact definition of that term, but we cannot because an almost limitless variety of issues may arise, and the circumstances may be different in each case. All that we can do is give some general guidelines for deciding whether there is such an issue in any particular case and some examples of past rulings on the subject.

1. Is the Issue of Public Importance? A dispute between a radio station and its landlord may raise a controversial issue, but normally not one of importance to the public. In deciding whether an issue is of public importance, the broadcaster should consider several elements:

(a) The amount of broadcast or newspaper coverage it has gotten, although, as a U.S. Circuit Court of Appeals stated in one case, "Our daily newspapers are filled with news items which good journalistic judgment would classify as newsworthy but which the same editors would not characterize as containing important controversial issues."

In another case, the National Football League Alumni Association had filed suit against the National Football League Players Association (NFLPA) to force payment of pensions to the former players under a retirement plan which had been set up for the sole benefit of members of the NFLPA. The FCC said that although the lawsuit had received some newspaper publicity, it appeared to be a private dispute that was only incidentally related to or of interest to the public.

(b) The degree of attention an issue has received from government officials and other community leaders.

(c) The third and the most important element in judging the public importance of an issue is the impact the issue is likely to have on the community at large and, if the issue involves a social or political choice, whether the outcome of that choice will have a significant impact on society or its institutions.

2. Is the Issue Controversial? In deciding this question, the broadcaster should consider the amount of attention it is getting from government officials, community leaders and the news media and, most of all, whether the issue is the subject of vigorous debate with substantial elements of the community in opposition to one another.

3. Substance of Broadcast Is What Counts. It is the actual content of a broadcast that must be considered in deciding whether it raises a controversial public issue, not the label the producer of the program has put on it or the program category into which it falls. Some broadcasters have mistakenly believed that because a program was labeled "religious" it was exempt from the Fairness Doctrine. Others have assumed that since a speech by a public official was an "official report" to Congress or the people, it did not fall within the doctrine. However, if a broadcast deals with a controversial issue of public importance, it falls within the scope of the doctrine, no matter what its title or format may be, from a spot announcement to a three-hour documentary.

4. "Truth" of Statement Doesn't Exempt It. The fact that a broadcaster believes a statement on a controversial issue or a personal attack on someone to be true does not exempt it from the Fairness Doctrine or the personal attack rule. The FCC will not put itself in the position of trying to determine whether a statement was true or false. If it did, it would find itself cast in the role of the national arbiter of the "truth" of everything broadcast and therefore the censor of the airwaves--a role which the Communications Act specifically forbids it to assume. Therefore, the Commission takes the position that even if the broadcaster believes a statement to be true, if the statement concerns a controversial issue of public importance, the other side must be given a chance to state its position so the public can make its own judgment.

5. Area in Which a Subject Is Controversial. An issue may be controversial and of public importance in one area but not another, as illustrated by the following example:

> A complaint was received that stations in Buffalo and Rochester, New York, had broadcast programs opposing the theory of evolution, and had broadcast no pro-evolutionist material. The Commission upheld the judgment of the stations that there was no evidence that the subject of evolution was at that time a controversial issue of public importance in these cities. The FCC gave the same answer to a person in another city complaining against pro-evolutionary broadcasts on the local station.

6. Number of Persons Affected by Issue. In addition to the geographical area in which an issue is controversial, another factor which sometimes must be considered is the number of persons affected by the issue. For example, the Commission upheld the judgment of a broadcaster that an election at a nearby military base to determine which of two government employees' unions would represent 1,230 civilian employees at the base was not a controversial issue of public importance in the station's listening area, which included a population of more than 200,000 persons.

7. Public Elections and Referendum Votes. Although the union election described above was found not to involve an issue of public importance in view of the small number of persons eligible to take part, elections of government officials and votes on ballot propositions normally raise controversial issues of public importance in their areas. The Commission has said that "The existence of an issue on which the community is asked to vote must be presumed to be a controversial issue of public importance, absent unusual circumstances."

8. "Mere Passing Reference" to an Issue. When a broadcast contains only a passing reference to an issue or the issue is mentioned only incidentally in the discussion of the principal subject, the Fairness Doctrine does not require the licensee to try to present contrasting views on the issue. The Commission has said that "If every statement, or inference from statements or presentations, could be made the subject of a separate, distinct fairness requirement, the doctrine would be unworkable." Moreover, the FCC would find itself too deeply involved in broadcast journalism. In one case, the Commission refused to upset the judgment of a licensee that the mention of fluoridation of water in only three of sixty sentences devoted to the subject of dental care did not require that the mention be classified as presentation of one side of a controversial issue of public importance. In another, the FCC upheld a network's judgment that brief references to the Subversive Activities Control Board were only incidental to discussion of another subject.

9. Effect of Passage of Time on an Issue. If enough time elapses, a subject that once was a controversial one of public importance may no longer be so for purposes of the Fairness Doctrine, since it is no longer the subject of "vigorous debate" among "substantial elements of the community." Examples of cases like this include one in which there was a discussion in 1972 of the World War II relocation of Japanese-Americans from the Pacific Coast to inland areas, and another in which Alger Hiss was interviewed about his conviction for perjury that had taken place 20 years earlier.

H. DOES THE BROADCAST ADVOCATE A VIEW ON A CONTROVERSIAL ISSUE?

One of the hardest problems for broadcasters to decide is whether a commercial announcement or some other kind of broadcast advocates one side of a controversial issue of public importance even though, on the surface, it may not clearly do so. On the one hand, some advertisers claim that their commercials are merely "institutional" when in fact they actually are seeking public support for one side of a controversial issue. On the other hand, some persons have sought to apply the Fairness Doctrine to commercial product advertising which does nothing more than sing the praises of a particular brand of toothpaste. Over a period of years in which all sorts of questions of this kind have arisen, the Commission has established policies to help it and broadcasters distinguish material which does not come under the Fairness Doctrine from material that does. These policies are explained briefly in the following paragraphs.

1. "Meaningful Statement ... Which Advocates a Point of View." In one case, an oil company sponsored spot announcements urging the development of oil resources on the North Slope of Alaska. There was an important public controversy at the time over building a pipeline across Alaska to carry the oil. The announcements did not specifically mention the pipeline, but the FCC found that they did present arguments that supported its construction. In providing guidelines for broadcasters in this difficult area, the Commission has said that if the arguments and views expressed in an ad "closely parallel the major arguments advanced by partisans on one side or the other of a public debate, it might be reasonable to conclude that one side of the issue ... had been presented, thereby raising Fairness Doctrine obligations." The Commission realizes that close questions will arise and it expects broadcasters "to do nothing more than to make a reasonable, common sense judgment as to whether the 'advertisement' presents a meaningful statement which obviously ... advocates a point of view on a controversial issue of public importance." In making this judgment, the broadcaster will, of course, have to take into account his own knowledge of the issues that are currently being debated and the arguments being used in the debates. If the ad has only a slight relationship to the current debate, the Fairness Doctrine will not apply to it. Other kinds of broadcasts which do not refer directly to a controversial issue must be judged on the same basis as paid ads. For example, a vote may be approaching on a school bond issue. Speaker A broadcasts a statement that the school system needs money to build a new high school (which the bonds would provide). Speaker B, in another broadcast, says no new schools are needed. Neither A nor B even mentions the bond issue or the upcoming vote on it. In such a case, the broadcaster must decide whether the speakers had "in an obvious and meaningful fashion presented a position on the ultimate controversial issue of whether the school bond issue should be approved." If their views "closely parallel" the arguments being used by the two sides to the bond issue debate, the broadcaster may very well decide that they have presented views on the school bond issue and that the Fairness Doctrine applies.

2. Ads for Commercial Products or Services. Advertisements that merely urge people to buy a commercial product or service or proclaim the merits of a particular brand of gasoline, breakfast cereal or headache remedy --to name a few examples--do not fall within the scope of the Fairness Doctrine. The Commission believes that since the Fairness Doctrine was designed to inform the public on significant controversial public issues, it would not be appropriate to apply it to mere claims of the merits of particular products. Among product advertisements to which the Commission has refused to apply the Fairness Doctrine are those for certain brands of gasoline, toothpaste, snowmobiles and trash compactors. Some persons have asked the FCC to apply the Fairness Doctrine to advertising of commercial products on the ground that the ads are false or misleading. However, the Commission has stated that the Fairness Doctrine is not the right method for correcting false or misleading advertising. The Federal Trade Commission was created by Congress for this purpose, and "If an advertisement is found to be false or misleading, we believe that the proper course is to ban it altogether rather than to make its claim the subject of a broadcast debate."

3. Institutional or Promotional Advertising. So-called institutional or promotional advertising may or may not fall within the scope of the Fairness Doctrine, depending on what it says, and, as stated above, whether it presents "a meaningful statement which obviously ... advocates a point of view on a controversial issue of public importance." Mere claims by a company or industry that it serves the public, or other forms of self-praise, amount only to "puffery" and do not raise fairness questions. For example, promotional spots broadcast by television stations citing benefits to the public of advertiser-supported TV, such as the broadcast of news, special events and sports without charge to the viewer, do not amount to advocacy of one side of a controversial public issue. On the other hand, if the announcements both praised advertiser-supported "free" TV and criticized pay television, they might have been found to fall within the scope of the doctrine.

I. WHAT MUST A LICENSEE DO TO PRESENT CONTRASTING VIEWS?

A broadcaster who presents one side of a controversial public issue must make a sincere effort to broadcast all significant contrasting viewpoints on that issue and not merely sit back and wait for someone to demand time in which to broadcast a response. The Commission never has laid down a set of rules on what a licensee must do in trying to bring about the broadcast of contrasting views. Primarily, it relies on the reasonable, good-faith judgment of the licensee, and it will intervene only when the licensee clearly seems to have been unreasonable or to have acted in bad faith. However, the Commission has given some examples of acceptable ways in which a broadcaster may fulfill his or her fairness obligations. In one case it cited these as examples of acceptable efforts:

(a) If the licensee knows that a responsible person or group in the community holds a contrasting view, offers that person or group a chance to express the contrasting view, and sends a copy or summary of material already broadcast on the issue.

(b) The licensee consults community leaders as to who might be appropriate spokespersons for a contrasting view, and then offers time to a recommended spokesperson.

(c) A station broadcasts announcements at the beginning or end (or both) of programs presenting controversial issues to the effect that responsible representatives of opposing views will be given an opportunity to express them if they so request.

A special effort may be needed when major issues have been presented in depth or when the licensee turns down the only person who volunteers to present an opposing viewpoint on the ground that such person is not a competent or responsible spokesperson.

1. How many Viewpoints Must Be Presented? On many controversial issues there are only two important viewpoints, but there may be more on others. The licensee should try to identify the major ones being debated on the issue and arrange for their presentation. However, a broadcaster is not required to present every conceivable point of view on an issue, especially when a complainant has not shown that his or her own view is both significant and different from those already broadcast.

2. Licensee May Not Rely on Other Media for Contrasting Views. The obligation to try to present contrasting views on an issue rests on each station individually. A broadcaster who presents one side of an issue cannot justify failure to try to present other sides by claiming that other media, such as newspapers, magazines or other stations in the area already have presented those views. Section 315(a) of the Communications Act places the responsibility on each broadcaster to provide an opportunity for opposing viewpoints.

3. Cannot Delegate Responsibility to Others or Harass Complainants. A station licensee not only cannot rely on other media to present contrasting views on an issue which the station has introduced, but it cannot delegate its Fairness Doctrine responsibility to any third party, including a person who conducts a commentary or a call-in program on the station. The Commission believes this is especially important when the person who conducts or moderates a program uses it to promote his or her own viewpoints and ridicules or otherwise discourages persons who try to express opposing views. Similarly, since it is the licensee's duty to encourage and try to bring about the presentation of conflicting views, the licensee itself should not harass persons who ask to present contrasting views or file fairness complaints with the station or the Commission. The Commission has censured licensees for such acts as publicly denouncing fairness complainants who merely seek to bring about compliance with the law; broadcasting their telephone numbers and urging listeners to call and harass them; threatening to sue them; or imposing unreasonable conditions before granting them an opportunity to respond. Along the same lines, the Commission has stated that a licensee should not "stack the cards" by deliberately selecting spokespersons for opposing views so as to favor one viewpoint at the expense of the other. The licensee should try to present genuine partisans of the opposing viewpoints--persons "who actually believe what they are saying."

J. WHAT IS A REASONABLE OPPORTUNITY FOR RESPONSE?

There is no fixed formula for deciding what is a "reasonable opportunity for response" when a station has presented one side of an issue. Circumstances will vary from case to case. As already explained in this Primer, "equal time" is not required in fairness cases, and the contrasting

view or views need not be presented on the same broadcast or same day on which the first viewpoint is presented. The Commission has never tried to set up a ratio between the amounts of time that must be given to conflicting views. As already stated, it relies first of all on the judgment of the broadcaster and it will uphold that judgment unless it appears to have been unreasonable or made in bad faith. The difference between these two standards (that is, the Commission's making its own judgment and its deciding whether the licensee's judgment was reasonable) may appear to some to be only a theoretical one, but it is in fact real. An appellate court pointed this out in sending one fairness case back to the Commission on the grounds that the Commission had decided the question on the basis of its own assessment of the facts rather than simply deciding whether the licensee had been reasonable in making its own judgment. Some of the main factors that must be considered by a broadcaster in deciding what kind of an opportunity to provide for contrasting views are explained in the following paragraphs.

1. Total Amount of Time, Frequency of Broadcasts, Nearness to Date of Vote. Although the Commission has set no ratio between the amounts of time that should be given different sides of an issue, the total amount of time clearly enters into the judgment the broadcaster must make. Obviously, giving one side ten times as much time as the other would not promote the cause of fairness. Since repetition is a well-known factor in the effectiveness of broadcasting, the broadcaster also must consider the frequency with which each side is presented, not only because an oft-repeated statement is more likely to be remembered than a one-time broadcast but because, for example, thirty one-minute messages will reach a larger and more varied audience than one thirty-minute message. Finally, the nearness to the date of the vote on an issue (if pertinent) helps to determine the effectiveness of a broadcast about it. A broadcast one day before a referendum is likely to be remembered considerably better on election day than a broadcast that took place a month earlier.

2. Potential Audience in Different Time Periods. It is obviously unreasonable to present one side of an issue in prime time but limit the other side to nonprime time periods, which are likely to have smaller audiences. This does not mean that contrasting views must be given in the same program periods or even in different periods that normally have exactly the same audience ratings, but it does mean that the probable size of the audience in any given period must be considered as one factor in providing time for contrasting viewpoints.

3. Relationship of Response to the Subject. If one side of a controversial public issue has been broadcast, the so-called "contrasting views" to be broadcast obviously must be reasonably related to the same issue. A licensee can reject a response that someone proposes to give if it neither concerns the issue already discussed nor presents a contrasting view on it.

4. Time Interval Between Opposing Broadcasts. If a station presents one side of a ballot proposition before the vote takes place and then delays the broadcast of contrasting views on the subject until after the referendum, it obviously has not complied with the requirements of the Fairness Doctrine. On the other hand, if the issue is a continuing one, the broadcaster need not carry contrasting views within any particular time span, so long as it tries to carry them while the issue still is controversial and has not been decided by a vote of Congress, a popular vote or any other final method of settling the issue.

5. Presidential Speeches. The Commission has received complaints at times based on the theory that a spokesperson for an opposition political party has an automatic right of reply to any speech made by an incumbent President. As stated many times in this Primer, the Fairness Doctrine does not entitle any particular person or group to respond to a broadcast on a controversial issue. The same principle applies to Presidential speeches. The licensee of the station has the obligation to decide (1) whether such a speech has raised controversial public issues; (2) if so, whether the station already has provided reasonable opportunity for contrasting views on the issues; and (3) if it has not done so, who should be chosen to present the contrasting views and in what kind of programs they should be presented. The FCC once found that Presidential speeches created a special fairness obligation; but only because of the unusual circumstances of that case. The President had made five, uninterrupted, prime time speeches giving the Administration's viewpoint on the Indochina War issue. The three TV networks also had carried a great deal of discussion of the issue on news, interview and documentary programs--about equally divided between the Administration's policy and opposing policies. In this particular situation, the FCC decided that the anti-Administration viewpoint on the question deserved at least one uninterrupted appearance by a spokesperson chosen by each of the three networks--not necessarily a representative of an opposition political party if a network should decide someone else was a more appropriate spokesperson. The Commission emphasized that this case was unique and that it was not ruling that this kind of an obligation would be created by a single Presidential speech.

6. Restrictions That May and May Not be Placed on Response. As stated earlier, the broadcaster may choose the best spokesperson to present a contrasting view and may make sure that the response deals with the issue originally broadcast and presents a contrasting view on it. However, a few stations have placed restrictions on responses that the Commission has found to be unreasonable:

(a) May Not Charge for Time for Response Unless Someone is Willing to Pay. A station that broadcasts one side of an issue cannot refuse to carry contrasting views merely because no one is willing to pay for the time, even though someone sponsored the broadcast of the original viewpoint. A station may try to obtain sponsorship of the response, but if it cannot do so it still has an obligation to inform the public of contrasting views.

(b) May Not Limit Appearance to Program Conducted by Partisan Opponent. When one side of an issue is presented by a person who conducts and controls a program and uses the program to advance his or her own partisan views on an issue, the licensee of the station does not offer a reasonable opportunity under the Fairness Doctrine if it limits the right of response to a joint appearance with that person on the same program, since the conductor or moderator of the program can control its content and "will always have the last word."

K. WHAT A COMPLAINANT MUST DO

We gave some general instructions about filing fairness complaints in the Introduction to this Primer. This Section gives more detailed information about what a person must do before the Commission will make an inquiry into a fairness complaint. The Commission will not require a broadcaster to explain his or her actions (or lack of them) in connection with an issue unless the complainant provides it with certain specific information. A good many complaints merely state that the complainant heard someone favor one side of a controversial issue on one program. Solely on this basis, they demand that the complainant or someone else be given time to broadcast an opposing view on the issue. The Commission will not act upon a complaint like this because the station may have presented opposing views on other programs. The Commission does not require a licensee to respond to a fairness complaint unless the complainant furnishes grounds for believing that the station has not presented opposing views on other programs. The broadcaster is not required to present both sides of an issue on the same program; merely to try to do so in the overall programming. Burdening a broadcaster with the task of proving that contrasting views were presented on every issue that was ever mentioned on any program might very well have the "chilling effect" on broadcast journalism that the Commission tries to avoid. In order to be fair to both complainants and broadcasters, the Commission has set up certain requirements for both. The station's obligations are explained in other parts of this booklet. The following paragraphs tell the complainant what is expected of them.

1. First Contact the Station or Network. Before sending a complaint to the Commission based on the Fairness Doctrine, write or call the station or network which broadcast the program about which you are complaining. The station or network may be able to furnish an answer that is satisfactory to you--for example, to show that in other programs it has presented the contrasting views that you think should be broadcast, or that it has definite plans to do so. If you receive no answer to your complaint or you consider the answer to be unsatisfactory, then write to the Commission, enclosing copies of letters you have sent to stations or networks and their replies, if any.

2. Define the Issue. Section G of this part of the Primer has explained what a controversial issue of public importance is. Before filing a fairness complaint, study Section G (also Section C of Part III) and try to determine whether the material that concerns you involved such an issue. If you complain to the Commission, specify exactly what the controversial public issue was, state why you believe it was controversial and of public importance, and state what programs carried a discussion of it and the viewpoints that were broadcast. One complaint received by the FCC merely alleged that the station had unfairly presented the issues of "world population, resource, food, water, space, birthrate situations." Another said a station had been unfair in presenting such issues as home rule, public schools, crime and police brutality. The Commission answered that, without detailed and specific evidence of failure of a station to comply with the Fairness Doctrine, it would be unreasonable to force stations to disprove the allegations by producing recordings or transcripts of news programs, editorials, commentary or other discussion of public issues, many of which may be broadcast over a long period of time.

3. Overall Programming of Station. You should give reasons for believing that the station has not, in its overall programming, presented or offered an opportunity to present views that are opposed to those that you heard broadcast. This does not mean that you must constantly listen to the station. The Commission has stated:

> Although some groups having a particular interest in a controversial issue ... have monitored a station for periods of time and thus been able to offer conclusive evidence that contrasting views were not presented ... such a requirement for every individual complainant would be an unduly burdensome one. While the complainant must state the basis of the claim that the station has not presented contrasting views, that claim might be based on the assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the station.... One example of a "regular" television viewer would be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs.... Complainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience.

4. Station's Response to Commission Inquiry. If you specify only one program as having presented one side of an issue and state that, although a regular listener, you never have heard contrasting views on other programs, the station need only give the Commission evidence of having broadcast one other program which did give opportunity for contrasting views on the issue. Of course, if you furnish evidence that the station has devoted more programs to a single side of an issue, the station may have to furnish evidence of having broadcast more in the way of contrasting views.

5. Delay in Filing Complaints. Although the Commission has set no deadline for filing fairness complaints, it is much easier to deal with such complaints--and they often can be settled more positively one way or the other--if you file your complaint as soon as possible after you have contacted the station and been unable to get what you believe to be a satisfactory response from it.

L. PERSONAL ATTACKS

The Commission's personal attack rule does not forbid the broadcast of personal attacks. Instead, it requires broadcasters who carry these attacks to notify the persons who have been attacked and offer them reasonable opportunities to respond.

1. Rule Applies Only When Controversial Issue Discussed. There are a number of limitations on applying the personal attack rule. First, because it is a part of the Fairness Doctrine, the attack must be made during the discussion of a controversial issue of public importance. The attack itself does not raise the controversial issue. For the rule to apply, the attack must be made while a controversial issue already is being discussed. See Section G of this part of the Primer for a discussion of what a controversial issue of public importance is.

2. Criticism of a Person is Not Necessarily a Personal Attack. Not every criticism or even every "attack" on a person or group is a "personal attack" under the rule. It must be an attack on "the honesty, character, integrity or like personal qualities" of an identified person or group. Unfavorable references to a person's intelligence, education or ability are not personal attacks, no matter how insulting they may sound. For example, an assertion that a public official is stupid and unfit to hold his job is not a personal attack under the rule, but a statement that he takes bribes or uses his office for private gain would be, because this is an attack on his honesty, character or integrity.

3. Attacks that the Rule Exempts. Even though an attack is made on "the honesty, character, integrity or like personal qualities" of an identified person or group during discussion of a controversial issue of public importance, the rule still may not apply. The following kinds of attacks are specifically exempted by the rule:

(a) Attacks on foreign groups or foreign public figures.

(b) Attacks made by legally qualified candidates for public office or their spokespersons or persons associated with them in the campaign against other candidates or their spokespersons or persons associated with them in their campaign.

(c) Attacks against anyone if made during "uses" of stations by legally qualified candidates.

(d) Attacks made in bona fide newscasts, news interviews and on-the-spot coverage of bona fide news events, including news commentary or analysis that is contained in any of these kinds of news programs. (However, the exemption does not apply to station editorials.)

4. What Station Must Do If Attack is Broadcast. If a personal attack is broadcast which does not come within any of the exemptions listed above, the station must send to the person or group attacked within one week after the broadcast the following:

(a) Notification of the date, time and identification of the broadcast.

(b) A script or tape of the attack (or an accurate summary if a script or tape is not available).

(c) An offer of a reasonable opportunity to respond over the station.

The Commission insists on full compliance with these three requirements. One station broadcast an attack on an organization and then sent a copy of the attack that was addressed to the initials of the organization and merely listed "Washington, D.C." as its address--without even trying to learn the correct address, which was in New York City. The Commission ruled that this was a violation of the rule. Even though the broadcaster may believe that the person or group already knows about the attack, he or she still must comply with all of the obligations listed above, including sending a copy of the attack and offering time in which to respond.

5. What Is "Reasonable Opportunity to Respond"? The Commission cannot give a definition of "reasonable opportunity to respond" because the circumstances will vary so much in different cases. In many cases it will be sufficient to allow the person attacked approximately as much time for a response as the attack consumed and to schedule the response in a period likely to draw approximately the same size audience. However, in other cases a "reasonable opportunity" may require more than was used in the attack. For example, if during the discussion of a controversial issue of public importance someone simply broadcast a statement that "John Smith is an embezzler," Smith would need more than the one or two seconds it took to broadcast this statement in order to have an opportunity to answer it effectively. A "reasonable opportunity" involves not only the amount of time made available, but the format of the program in which the response is made. The Commission says that a broadcaster who airs an attack cannot insist that the response be made on a round table or panel discussion program, because this kind of program may not provide a full chance to answer the attack. Also, if the station repeats the attack in introducing the response or as a follow-up to it, the station has not reasonably complied with the personal attack rule. The Commission has stated:

> ... if the attacked party knew that if he accepted a station's offer of reply time he would subject himself to attack again at the time of such reply, it would discourage the attacked party from defending himself and thereby help to frustrate our goal of encouraging robust debate.

In such circumstances, the station would have an obligation to offer the person an opportunity to respond to the second attack. The broadcaster can insist, however, that the proposed response to an attack be reasonably related to the attack rather than getting into unrelated subjects. As for demanding payment for broadcasting the response, the same principle applies to personal attacks as to other parts of the Fairness Doctrine; that is, the broadcaster can try to obtain paid sponsorship of the response, but he or she cannot refuse to broadcast it on the ground that no one is willing to pay for it.

6. Examples of Personal Attacks. Calling a person a liar, a coward, a thief or a traitor to his country or accusing him of fraud or political corruption have been held to be personal attacks. Some examples of cases in which there were personal attacks follow:

(a) A broadcast charged that an identified person "is either inefficient ... or he is willing to pander with falsehoods."

(b) A station quoted tenants of a slum hotel as accusing the hotel owner of setting fire to it to drive them out. The owner also was accused of "ruthlessly driving from their homes individuals 70 or 80 years old," and the program implied that he might have been responsible for threatening the life of a priest who was trying to organize the tenants.

(c) A person or organization was called Communist.

(d) It was implied that the John Birch Society often engages in "physical abuse and violence," disrupts "other people's meetings" and engages in "local terror campaigns against opposition figures."

(e) A person was accused of making a "false charge publicly on television" and later of confessing that he "had made up the whole story."

(f) Debt-adjusting businesses in a city were referred to with such terms as "stealing," "robbery," "theft," "trickery" and "deceit."

(g) A person was charged with resorting to a "deliberate lie."

(h) A real estate company was cited as a prime example of "exploiters ... whose tactics of racial fear cheated nervous white families out of their homes and then exploited the black families who moved in."

7. Examples of Cases in Which There Were no Personal Attacks. Broadcast criticism may not amount to a personal attack under the rule for several reasons, among them: (i) the fact that it was not made during discussion of a controversial issue of public importance; (ii) the fact that no particular person or group was identified as the object of the attack; and (iii) the fact that the attack was made during an exempt type of program. Following are some other examples of statements in which personal attacks were found not to have taken place because the attack was not on a person's "honesty, character, integrity or like personal qualities":

(a) Referring to a woman as "self-appointed guardian of Red Lodge's sidewalk decorum."

(b) Calling a person a "political opportunist."

(c) Stating that certain judges had imposed sentences that apparently violated state law.

(d) Referring to a complainant as "the garrulous grand dame of Billings talk shows" and "pistol-packing momma."

(e) Characterizing a person as a "confirmed nuisance" and "obnoxious."

(f) Referring to some doctors and nurses as incompetent.

8. Truth of Attack No Defense. The Commission has ruled that the alleged truth of a personal attack does not relieve the broadcaster of his or her obligations under the rule. The Commission will not try to determine whether the attack was true, since that would put it into the position of being the national judge of the "truth." Rather, it says, the broadcaster should let the public hear the other side so that it can make its own judgment on the matter.

M. THE FAIRNESS DOCTRINE AND POLITICAL CAMPAIGNS

The Communications Act requires stations to make "equal opportunities" available to political candidates, which is a more definite requirement than the Fairness Doctrine obligation to provide "reasonable opportunities" for contrasting views on controversial issues of public importance. Moreover, the equal opportunities obligation refers to people (candidates), whereas the reasonable opportunity obligation is for issues, except in the case of personal attacks as discussed in Section L above and political editorials as discussed below in this section. However, the Fairness Doctrine often becomes important in political campaigns, as explained in the following paragraphs.

1. Fairness Doctrine Applies to News and Other Exempt Coverage of Candidates. The Fairness Doctrine does not apply to "uses" by political candidates--that is, to appearances by candidates themselves on programs to which the "equal opportunities" requirement applies. Thus, if Candidate Smith buys time to promote his candidacy, his opponent is not entitled under the law to an equal amount of free time, which would be the case if the Fairness Doctrine applied to such political appearances, as explained in Section J(6)(a) of this part of the Primer. 1/ All the political opponent is entitled to is a chance to buy an equal amount of time. The Fairness Doctrine does apply to appearances by candidates on programs which are exempt by law from the "equal opportunities" requirement; that is, to appearances on bona fide newscasts, bona fide news interviews, on-the-spot coverage of bona fide news events and bona fide news documentaries if the appearance of the candidate on the documentary is incidental to its subject. The Fairness Doctrine also applies to overall news coverage of candidates. The controversial public issue in a political campaign is which candidate for an office should be elected. The individual candidates represent "contrasting viewpoints" on the issue. The individual candidates themselves are not such issues. Therefore, under the general principles of the Fairness Doctrine the broadcaster may use his or her reasonable, good faith judgment about the comparative significance and newsworthiness of the competing candidates and decide on this basis how much coverage to give each candidate. For example, a broadcaster is not required to give as much coverage to "fringe" party candidates as to major-party candidates (although, in some cases, "fringe" party candidates may create so much news that they will receive as much coverage as their major-party opponents). However, this is up to the judgment of the broadcaster.

1/ For a full discussion of political broadcasting regulations, see the Commission's Primer on Political Broadcasting Law, 69 FCC 2d 2209 (1978).

2. Appearances by Supporters of Candidates. Normally, appearances by supporters of candidates do not come under the "equal opportunities" requirement of the law since it refers to "uses" of stations by candidates themselves. However, the Commission applies the Fairness Doctrine in a special way to appearances by supporters of major party candidates. If supporters of Candidate A buy time in which to urge A's election or the defeat of his opponent, B, but A does not appear in person on the broadcast, supporters of Candidate B are entitled to buy a comparable amount of time. If A's supporters receive free time, B's supporters are entitled to the same treatment. This is the so-called "Zapple Doctrine." The Commission recognizes that although such broadcasts would not ordinarily call for comparable treatment of both sides, they fall in "the political arena" and a "quasi-equal opportunities" situation arises in which the Fairness Doctrine has the same result as the equal opportunities requirement does for candidates themselves.

3. Political Editorials. A rule similar to that which covers personal attacks deals with political editorials. Briefly, the rule says that when a station licensee broadcasts an editorial endorsing one candidate or opposing another, the licensee must, within 24 hours of the broadcast, send the candidate or candidates for the same office that it did not endorse or the candidates that it opposed: (i) notification of the date and time of the editorial; (ii) a transcript or recording of it; and (iii) an offer of a reasonable opportunity for the candidate or his or her spokesperson to respond over the station. If the editorial is broadcast within 72 hours of election day, the station must comply with these requirements "sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in timely fashion."

(a) Candidate Not entitled to Respond in Person. Note that political candidates are not necessarily entitled to respond in person to political editorials. If they did, their opponents in the race would have to be given "equal opportunities" under the law, and since the station could not censor what they said, they could use their so-called "equal time" in any way they chose. This is why the broadcaster is given the option of offering response time to a spokesperson of the candidate. However, the Commission has said that "Barring extraordinary circumstances, the choice of the spokesperson ..." is left to the candidate involved.

(b) What is a Station Editorial? A station editorial is a statement of the views of the licensee of the station, such as its owner, a principal officer, or the manager or another employee if the licensee has authorized him or her to speak for the station. A statement may be an editorial for purposes of the rule even if it is not labeled as one. For example, on the day before an election the president and principal owner of a station endorsed several candidates during an interview with him that was broadcast on his station. He later claimed that his statements expressed only his personal views and were not an editorial endorsement of the candidates by the station itself. However, the Commission ruled that "when the president and controlling stockholder of a licensee ... endorses candidates for public office, such endorsements are indistinguishable from a station editorial...." Obviously, if licensees were allowed to evade the rule by giving different names to their endorsements or using formats different from those normally used for editorials, the rule would have little effect.

(c) Reasonable Opportunity to Respond. As with the personal attack rule, there can be no single definition of a "reasonable opportunity" to respond to a political editorial because the reasonableness of the opportunity may vary with the circumstances. The Commission has said that in many cases "a comparable opportunity in time and scheduling will be appropriate" but that "in others, such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response." For example, if an editorial merely stated that the following candidates were best qualified for election to the city council and then listed 10 names, the entire editorial might be less than one minute long but a reasonable opportunity for response by one of the candidates not endorsed certainly would require more than one-tenth of the time occupied by the editorial. On the other hand, the candidate may rightfully object if he is offered the same total amount of time as a station's six 10-second editorials, but the offer is for one 60-second response. In such cases of candidate objection, the FCC may rule on the basis of some past cases that the candidate is entitled to something approaching the same frequency of responses, even though the responses add up to no more time than the one minute offered him, since it is well recognized in broadcasting that the effectiveness of a message may depend in part on the frequency with which it is broadcast.

(d) When Does an Editorial Endorse or Oppose a Candidate? It is not always entirely clear whether an editorial endorses or opposes a candidate. Here are two cases where the Commission found that the rule applied even though the stations claimed that it did not:

(1) Two of the five members of the local Board of County Commissioners were running for reelection. Without naming any member of the Board, a station broadcast an editorial criticizing the Board and urging the public to vote for "a change." The Commission ruled that the editorial was, in effect, a statement of the licensee's opposition to the reelection of the two Board members seeking election and therefore was a political editorial under the rules.

(2) A county prosecuting attorney was a candidate for nomination for governor. On the day before the primary election, a station broadcast an editorial six times, strongly criticizing the candidate's record as prosecutor, but making no mention of the primary election or the fact that he was a candidate in it. The licensee of the station denied that the editorial had opposed the prosecutor's candidacy for governor, but acknowledged that the prosecutor's record was a controversial issue with political implications and that the licensee had been aware of the "political significance of the editorial." The Commission ruled that the editorial was a political one opposing the prosecutor's candidacy for governor, because the station took "a partisan position on a politically significant issue which is readily and clearly identified with a legally qualified candidate." It said that the editorial, by inference, challenged the qualifications of the official to obtain the nomination for governor; that "The editorial was broadcast on election eve, even though ... the issue was of public concern long before"; and that the editorial dealt with the candidate's "capacity to function as a public official."

H. MISCELLANEOUS RULES AND POLICIES

This part of the Primer does not deal with the Fairness Doctrine itself, but with Commission rules and policies that sometimes become involved in fairness cases.

1. Sponsorship Identification. The Communications Act requires a station that is paid to broadcast something to announce, at the same time, that the broadcast is paid for and who paid for it. The FCC will accept use of the word "sponsored" instead of "paid for" because the public understands it to mean the same thing. However, some sponsors and stations have tried to substitute other terms which do not fully inform the public that payment has been made. One such term is "presented by _____." It does not clearly reveal that the program or announcement was paid for, because many unsponsored programs that are merely produced by non-profit organizations are introduced in this way, and therefore the public does not understand the term to mean "paid for." In one case, the FCC ruled that the following announcement was not a clear enough sponsorship identification:

> This is Jack Douglas speaking for the Minnesota School Boards Association ...

2. Announcing that Program Material is Furnished Free. If a program deals with a political matter or any controversial public issue, and if a person or group furnishes films, records, scripts, performers or other services free in order to induce the station to broadcast the material, the station must make an announcement that the material or service has been furnished to it. The purpose here is to let the public know "by whom it is being persuaded," which is the purpose of the sponsorship identification requirement outlined in par. 1 above. The requirement about announcing the furnishing of free material or services does not cover mimeographed or printed press releases; only such material as films, recordings, and scripts. However, it does cover "services" as well as material. Thus, not only is the announcement required when a Congressman sends his recorded or filmed "report to the people" to stations in his constituency, but it is required even when he makes available to a station a camera or sound recording crew so that a reporter for the station can interview him on a political or controversial matter.

3. List of Officers of Sponsoring Organizations. There is still another requirement that applies when: (i) the broadcast is about a political matter or a controversial public issue; and (ii) it is sponsored by--or the material is furnished by--a corporation, committee, association "or other unincorporated group or entity." In addition to making an announcement that the broadcast is paid for by the group or that material or services have been furnished by the group, the station must keep a list of the chief executive officers or members of the board of directors or executive committee of the corporation or group, and make it available for public inspection on request. There is an obvious reason for this. If a broadcast advocating one side of a controversial public issue is sponsored by the "Good Government Committee," many members of the public may not have the slightest idea of who actually controls that committee and is trying to persuade them to adopt its views. The rule makes it possible for the public to learn the names of the people behind such organizations.

4. Bias or Distortion in News Reporting. A person filing a Fairness Doctrine complaint sometimes will also assert that the station has slanted or distorted its news reports on the subject of his complaint. However, the Commission will not try to judge for itself whether a news program is biased or slanted, because it soon would find itself the national arbiter of the "truth"—a role that a government agency should not take on, since it would amount to censorship of news. The Commission does consider deliberate falsification or slanting of the news to be an especially harmful act, and when it receives extrinsic evidence of such a practice it will take action. By "extrinsic" evidence, the Commission means evidence outside the content of the program -- evidence based on something more than the Commission's own conclusions from hearing or seeing the program in question. It means "testimony, in writing or otherwise, from 'insiders' or persons who have a direct personal knowledge of an intentional attempt to falsify the news." Thus, if a news reporter or commentator states that he or she was ordered by the news director, general manager or president of a station to slant a news item, the Commission will act, because this is extrinsic evidence. It will not act merely because it believes, from reviewing the contents of a program, that someone must have meant to slant the news. That would get it into the impossible role of trying, in the first place, to judge what the "truth" of an event was and thereafter judging whether the station presented the "truth." As the Commission has said:

> ... the policy of the First Amendment to foster "robust, wide-open debate" ... certainly permits the analysis of any spokesman to be one-sided. What is required, under the Fairness Doctrine, is not that he be censored but that the other side be given the opportunity to present its viewpoint.

PART III - DETAILED EXPLANATION OF FAIRNESS DOCTRINE; HOW IT APPLIES TO SPECIFIC SITUATIONS

A. GENERAL PRINCIPLES

The Fairness Doctrine requires a station: (i) to broadcast discussion of the most important issues of public importance in its coverage area; and (ii) to try to bring about the presentation of conflicting views on these issues. 1/ It is the broadcaster who decides what issues are most important in its area. The FCC will not intervene in this or any other of the licensee's Fairness Doctrine decisions unless there is evidence that it acted unreasonably or in bad faith. The broadcaster is responsible not only for choosing the issues to be discussed but for deciding the forms of programming in which they are to be presented, what the important contrasting views are on each issue, and who the best spokesperson is for each point of view. 2/

A controversial issue may arise in any kind of programming—for example, in public service announcements, commercial announcements, station editorials, speeches, debates, panel discussions, news programs, interview programs (including "open mike" telephone programs) and entertainment programs. Even a program that is labeled "religious" may raise a controversial public issue. It is not the title of a program that is important. It is what it contains.

The broadcaster need not give the same amount of time to each side of an issue as he would in granting "equal opportunities" to political candidates. All it need do is to encourage the presentation of, and provide reasonable opportunity for, different views on the issue in the overall programming of the station.

Exact "Fairness" Is Not Guaranteed

The Fairness Doctrine does not guarantee exact "fairness" in the same sense in which many persons would interpret the word. 3/ This kind of "fairness" would require that all significant contrasting views on an issue be presented on the same broadcast during exactly equal amounts of time. This would place such a heavy—indeed, sometimes impossible—burden on broadcasters in presenting controversial issues that it would discourage the "uninhibited, robust, wide-open" debate on these issues 4/ which is our goal under the First Amendment. For example, the news editor of a station may receive a newsworthy statement by a public official advocating or opposing a certain position on a current controversial public issue. When the deadline for the next newscast arrives, no one has spoken up with a contrasting view on the issue. Exact "fairness" would prevent using the official's statement on the news program, no matter how important or newsworthy it might be, and it would prevent the live broadcast of a Presidental news conference. The same restriction would apply to an "open mike" telephone program on which a caller might volunteer a view. In order to make it practicable for broadcasters to present discussion of important public issues, the Fairness Doctrine does not require them to

1/ See last sentence of Section 315(a) of the Communications Act as quoted in Section E, Part I of this Primer; Report on Editorializing by Broadcast Licensees, 13 FCC 1246, 1247, 1249, 1251 (1949); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 111 (1973); Fairness Doctrine and Public Interest Standards ("Fairness Report"), 48 FCC 2d 1 (1974); recon. denied, 58 FCC 2d 691 (1976); on appeal, two aspects remanded for further FCC consideration, sub nom. NCCB v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), cert. denied 436 U.S. 926 (1978), original report re-affirmed by Report and Order (BC Docket No. 78-60), 74 FCC 2d 163 (1979), Recon. pending.

2/ See p. 1251 of Editorializing Report cited above and p. 8 of Fairness Report.

3/ Committee for Fair Broadcasting, 25 FCC 2d 283, 292, 293 (1970).

4/ New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

delay presentation of one side of a question until a responsible spokesperson is ready to present the other side on the same broadcast, nor are they required to allot exactly equal amounts of time to each side. 5/ All they must do is make an honest effort to present contrasting views in their overall programming, so the public will not be left uninformed about important public issues. As the Commission stated in its Fairness Report at p. 8:

> In developing and implementing the Fairness Doctrine, it has never been our intention to force licensees to conform to any single, preconceived notion of what constitutes the "ideal" in broadcast journalism. Our purpose has been merely to establish general guidelines concerning minimal standards of fairness ...

5/ Horace P. Rowley, III, 41 FCC 2d 300 (1973), recon. denied, 45 FCC 2d 1069 (1974).

B. OBLIGATION TO CARRY DISCUSSION OF ISSUES

The first obligation of the broadcaster under the Fairness Doctrine is to carry discussion of the most important public issues in the area covered by the station. In its Editorializing Report 1/ the Commission stated that the licensee has "an affirmative responsibility to provide a reasonable amount of time for the presentation of ... programs devoted to the discussion and consideration of public issues." The U. S. Supreme Court, in upholding the constitutionality of the Fairness Doctrine in its famous Red Lion case, 2/ in 1969, stated:

> It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions.

1/ 13 FCC 1246, 1249 (1949).

2/ Red Lion Broadcasting Co. Inc. v. FCC, 395 U.S. 367, 394 (1969).

Although broadcasters themselves are responsible for deciding what a reasonable amount of time is for the discussion of public issues, the FCC has emphasized the need for allocating a substantial amount of time for this purpose. In fact, it has stated that "it has allocated so much spectrum space to broadcasting, basically because of the great contribution which broadcasting can make to an informed public opinion on the vital public issues of the day." 3/

3/ Democratic National Committee, 25 FCC 2d 216, 222 (1970).

Selection of Particular Issues

The broadcaster must decide not only how much time to devote to news and discussion of public issues, but what particular issues are important enough in the station's service area to require broadcast coverage. If the broadcaster's judgment appears to have been made within reason and in good faith, the Commission will uphold it, even though the Commission itself might have decided the matter differently if it had been responsible for making the original decision. 4/

4/ See, for example, John G. Schmitz, 32 FCC 2d 933 (B/c Bur. 1972); Horace P. Rowley, III (WCBS), 48 FCC 2d 99 (B/c Bur. 1974).

Although it is the Commission's policy to defer to the licensee's judgment, its discretion is not absolute, 5/ and "some issues are so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely." 6/

5/ Committee for Fair Broadcasting, above, p. 292.

6/ Fairness Report, above, p. 10, citing Gary Soucie, 24 FCC 2d 743, 750-51 (1970), rev'd sub nom., Friends of the Earth v. FCC, 449 F. 2d 1164 (D.C. Cir. 1971).

Strip-Mining Issue

In the leading case of this kind, the Commission found that the licensee had acted unreasonably in failing to cover a controversy on strip-mining which the Commission said was an "issue which clearly may determine the quality of life in [the city in which the station was located] for decades to come." In this case, the complainants had furnished evidence of the extreme importance of the strip-mining issue in the West Virginia area served by the station, and the station had not provided evidence that it had adequately covered the issue of strip mining. The Commission emphasized, however, that although a licensee's "failure to adequately cover a 'critical issue' in a particular community would require appropriate remedial action on the part of the Commission," such instances are rare "and licensees are not obligated to address each and every important issue which may be considered a controversial issue of public importance." 7/

7/ Rep. Patsy Mink (WHAR), 59 FCC 2d 987, 994-97 (1976).

Thus, it is only the extremely important or critical issue on which the Commission will intervene with regard to the "First Part" of the licensee's fairness obligation--the obligation to broadcast discussion of the most important controversial public issues in the station's service area.

One Side Cannot Veto Discussion of Issue

In one of the few other cases in which the FCC has found a station at fault for not carrying discussion of a controversial public issue, the station had refused to grant time for discussion of a major local strike unless both the union and the company agreed in advance to make use of its facilities jointly. 8/ The licensee itself acknowledged that the strike involved "an issue of paramount importance to the community." In ruling that the station had not complied with the Fairness Doctrine, the Commission quoted from its Editorializing Report 9/ at pp. 1250-51:

> ... [W]here the licensee has determined that the subject is of sufficient import to receive broadcast attention, it would obviously not be in the public interest for spokesmen for one of the opposing points of view to be able to exercise a veto power over the entire presentation by refusing to broadcast its position. Fairness in such circumstances might require no more than that the licensee make a reasonable effort to secure responsible representation of the particular position, and, if it fails in this effort, to continue to make available its facilities to the spokesmen for such position in the event that, after the original programs are broadcast, they then decide to avail themselves of a right to reply to present their contrary opinion ...

8/ Evening News Association (WWJ), 40 FCC 441 (1950).

9/ 13 FCC 1246 (1949).

Station Need Not Sell Time for Discussion of Issues

A licensee must allocate a reasonable amount of time for discussion of controversial public issues and try to present contrasting views on the issues of greatest importance in its coverage area, but it need not sell time to anyone seeking to present views on a controversial issue, although it may do so if it wishes. 10/ The leading case on this subject involved requests by two organizations, the Democratic National Committee (DNC) and Business Executives' Move for Vietnam Peace (BEM), to purchase time from broadcasters to present viewpoints on controversial issues of public importance. 11/ In the same declaratory ruling referred to in footnote 10, the FCC denied the DNC's request for a declaration that broadcasters "may not, as a general policy, refuse to sell time to responsible entities, such as DNC ..., for comment on public issues," thus limiting the scope of the ruling to solicitation of funds by major political parties. BEM had sought to buy one-minute announcements urging immediate withdrawal of American forces from Vietnam. The station refused to sell the spots for this purpose. It stated that it already had given full coverage to contrasting views on the Vietnam issue and that it had a long-established policy of refusing to sell spot announcements to present views on controversial issues because "subjects of this type require a more in-depth analysis that can be provided in a 10-, 20-, 30- or 60-second announcement." The Commission upheld the station on the grounds that: (i) the licensee appeared to have presented a wide variety of views on the Vietnamese war, including the views the complainant proposed to present; (ii) under Section 3(h) of the Communications Act, a station is not a common carrier and "therefore is not required to open its doors to all programs seeking to use the station's facilities for whatever purpose"; and (iii) under the Fairness Doctrine the licensee has the right to use its good-faith, reasonable judgment in choosing appropriate spokesmen for conflicting views on an issue, as well as the formats in which the viewpoints are to be presented. In a consolidated proceeding the Commission was overruled in both cases by the U.S. Circuit Court of Appeals for the District of Columbia Circuit, but was eventually upheld by the U.S. Supreme Court. With regard to demands for compulsory, paid access to radio for presentation of controversial issues, the Supreme Court stated that "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth." 412 U.S. at 123. The Court also stated:

> This policy (of concentrating the allocation of journalistic priorities in the licensee) gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs. No such accountability attaches to the private individual, whose only qualifications for using the broadcast facility may be abundant funds and a point of view. To agree that debate on public issues should be "robust and wide-open" does not mean that we should exchange "public trustee" broadcasting, with all its limitations, for a system of self-appointed editorial commentators [412 U.S. at 125].

10/ There are three exceptions to this policy. The Commission has stated that broadcasters may not "adopt or follow arbitrary policies" of refusing to sell time to "significant political parties for the solicitation of funds." Democratic National Committee, 25 FCC 2d 216, 230 (1970). The second exception is a requirement, under Sections 312(a)(7) and 315(a) of the Communications Act, that under some circumstances a station must sell time to a legally qualified candidate for public office. The third exception involves appearances by supporters of candidates (the Zapple Doctrine) rather than the candidate. See Section G, paragraph 3, below.

11/ Democratic National Committee, 25 FCC 2d 216 (1970), and Business Executives' Move for Vietnam Peace, 25 FCC 2d 242 (1970), rev. (both cases), Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), rev. and FCC aff'd, sub nom CBS v. Democratic National Committee, 412 U.S. 94 (1973).

In another case, the Commission upheld the right of a number of stations to refuse to sell one hour of time for a documentary presenting one side of a controversial issue of public importance. 12/

12/ The Committee of One Million, 33 FCC 2d 545 (1971); also, see Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973).

C. WHAT IS A CONTROVERSIAL ISSUE OF PUBLIC IMPORTANCE

It is impossible to give an all-inclusive definition of a controversial issue of public importance because an almost limitless variety of issues may arise and the circumstances may be different in each case. All the Commission can do is to provide general guidelines for use in deciding this question and to give illustrative examples of its own past rulings.

Is an Issue One of Public Importance?

1. The broadcaster must decide not only whether an issue is controversial but whether it is one of public importance. For example, a broadcast by the owner of a station complaining that he or she is being charged too much rent by the owner of the station's premises or that the landlord does not properly maintain the premises certainly involves a controversy, but not one of importance to the public. 1/ This question may not be so easily answered in some other cases. One element to be considered is the amount of broadcast or newspaper coverage that an issue has received, although "an issue is not necessarily a matter of 'public importance' merely because it has received broadcast or newspaper coverage." 2/ In Healey v. FCC, 3/ the court stated:

> Our daily newspapers and television broadcasts alike are filled with news items which good journalistic judgment would classify as newsworthy, but which the same editors would not characterize as containing important controversial public issues.

In the Healey case, the issue was whether the complainant's role as an avowed Communist was a controversial issue of public importance requiring the licensee to provide time to respond to broadcast remarks that were unfavorable to the complainant's activities as a member of the Communist Party. In upholding the FCC's refusal to find the licensee unreasonable in determining that the remarks did not raise a controversial issue of public importance, the D.C. Circuit Court also stated on p. 923:

> To characterize every dispute of this character as calling for rejoinder under the Fairness Doctrine would so inhibit television and radio as to destroy a good part of their public usefulness.... It would in every way inhibit that "robust public debate" that the Fairness Doctrine was born to enhance.

In another case, the National Football League Alumni Association had filed a lawsuit against the National Football League Players Association (NFLPA) to compel inclusion of former professional football players in pension benefits under a retirement plan which had been established for the sole benefit of members of the NFLPA. A CBS sports commentator expressed the opinion during a broadcast that former professional football players not presently included in the NFL retirement plan should be included because they were responsible in part for making professional football successful. Although the lawsuit had received a certain amount of newspaper publicity, CBS stated that in its opinion the commentator's remarks did not deal with a controversial issue of public importance. The Commission's Broadcast Bureau quoted the court in the Healey case and found that CBS had not been unreasonable or arbitrary in reaching its decision. The Bureau stated:

> ... it does not appear that this dispute had assumed the proportions of such controversy and public importance as to come within the Fairness Doctrine. Rather, the evidence submitted herein clearly shows that NFLPA and the Alumni Association were engaged in a dispute wholly private in nature and only incidentally related to or of interest to the public. 4/

In still another case, the Bureau upheld the licensee in its decision that an announcement of the dismissal of an employee did not involve a controversial issue of public importance. 5/

Another element mentioned in the Fairness Report as a possible criterion of the public importance of a controversy is "the degree of attention the issue has received from government officials and other community leaders. However, the principal test of public importance is not the extent of media or governmental attention, but rather, a subjective evaluation of the impact that the issue is likely to have on the community at large. If the issue involves a social or political choice, the licensee might well ask himself whether the outcome of that choice will have a significant impact on society or its institutions." 6/

Is the Issue Controversial?

2. As to whether an issue is not only of public importance but controversial as well, the licensee should consider "the degree of attention paid to an issue by government officials, community leaders, and the media ..." and "whether an issue is the subject of vigorous debate with substantial elements of the community in opposition to one another." 6/ As the Commission's original Report on Editorializing 7/ pointed out, however,

> ... in many cases, programs initiated with no thought on the part of the licensee of their possibly controversial nature will subsequently arouse controversy and opposition of a substantial nature which will merit presentation of opposing views....

3. Substance of Broadcast. In deciding whether a program deals with a controversial issue of public importance, the licensee must consider the substance of the broadcast rather than its title or program category. Thus, a religious broadcast may well contain advocacy of one side of a controversial issue on a social, political or economic matter, or even a

1/ Although such a broadcast would not involve the Fairness Doctrine, it might well constitute use of a station's programming to serve the private interest of the licensee rather than the public interest. See Lincoln County Broadcasters, Inc. (WIKC), 51 FCC 2d 65 (B/c Bur. 1975); Public Service Enterprises, Inc. (WETT), B/c Bur. April 15, 1971.

2/ Fairness Report, cited above, pp. 11, 12.

3/ 460 F.2d 917, 922 (D.C. Cir. 1972).

4/ Edward R. Garvey (CBS), 39 FCC 2d 429, 432 (B/c Bur. 1973).

5/ Dave Pelletier, 31 FCC 2d 482 (B/c Bur. 1971); see, also, Chuck Cossin, Sr., 43 FCC 2d 453 (B/c Bur. 1973).

6/ Fairness Report, pp. 11-12.

6/ Fairness Report, pp. 11-12.

7/ 13 FCC 1246, 1251 (1949).

personal attack. 8/ In one case, complaints were received that a program featuring a nutritionist was presenting only one side of controversial issues of public importance. Some station licensees claimed that the program merely dealt with good health and nutritious diet and should not be considered a discussion of controversial issues. The Commission replied that if the licensees of the stations had listened to the program (and all licensees have an obligation to know what they are broadcasting) they would have known that it dealt at times with controversial public issues. The nutritionist expressed views on fluoridation of water, the value of an alleged cancer cure and the use of high potency vitamins without medical advice, which views he himself stated were opposed by many authorities in these fields. 9/ In a number of other cases, public officials spoke on the air and the broadcasters believed that such "official reports" did not fall within the Fairness Doctrine. Here again, however, it is the substance or content of the speech that counts, not the label put upon it. If it deals with a controversial issue of public importance, it falls within the scope of the Fairness Doctrine. 10/

4. Alleged Truth of a Statement Doesn't Exempt It. If a statement is made advocating one side of a controversial public issue or attacking a person or group, it is not exempt from the application of the Fairness Doctrine or the personal attack rule merely because the licensee believes that it is true. The FCC will not try to determine the truth or falsity of such statements. Rather, the other side must be given a chance to state its position and then the public will be in a position to make its judgment on an issue which the licensee chose to present as one of importance to its audience. 11/

5. Area in Which Issue is Controversial. A public issue may be controversial in one geographical area but not in another. In par. 15 below, examples are given of cases in which the Commission and/or the Bureau found a licensee reasonable in deciding that an issue was not controversial and of public importance in the area covered by the station. However, in other cases, the facts were such that the Commission found licensees unreasonable in deciding that an issue was not one of public importance in their service area. In one such case, a number of California stations claimed that a speech by the Governor of the State, announcing the temporary closing of all state universities and colleges and requesting private schools to consider similar action because "deliberate violence and disruption" was planned for the campuses did not present one side of a controversial issue of public importance. After reviewing the facts, the Commission found that the judgment of these stations had been unreasonable. One station stated the issue was not controversial for it because no colleges in its vicinity were affected by the Governor's action. The Bureau replied that this fact did not "remove the matter from the realm of controversy in that area, since the closing of all state universities and colleges and the Governor's request that all private schools consider similar action appears to have been likely to affect and result in controversy, in all parts of the state." 12/ In another case, a licensee which had given one-sided treatment to the subject of pay television claimed that although pay-TV was a controversial issue nationally, it was controversial in the station's own service area to only a very limited extent. The Commission said that the licensee had evidently thought the subject to be of enough general interest to devote broadcast time to it and even to preempt part of a local program to present the views of a Senator in opposition to pay-TV. Moreover, said the Commission, a licensee cannot excuse a one-sided presentation on the basis that the subject matter is not controversial in its service area when it fails to make a fair presentation of facts and arguments on the question so that public opinion about it can properly develop. 13/ In another case, a licensee claimed, in substance, that a nationwide lettuce boycott being advocated by the United Farm Workers Union was not a controversial issue of public importance in Rome, Georgia. The licensee had broadcast at least 12 programs in the summer and fall of 1972 in which the boycott was opposed; in addition, one commentator had urged listeners to cross picket lines and buy lettuce, had held contests for recipes containing lettuce and had repeatedly stated that it was "Buy a Head of Lettuce Day." The FCC said "Based on the extensive coverage that WIYN gave to the lettuce boycott issue at the time that this issue appears to have been a controversial issue of public importance nationally, and WIYN's repeated broadcasts advocating one view on the issue, it was unreasonable for the licensee to have concluded that it was not a controversial issue of public importance in the Rome, Georgia area." 14/ In still another case, two stations carried a nationally syndicated program which contained views critical of a proposed nuclear test ban treaty. The stations indicated that they believed the Fairness Doctrine applied only to local issues. The Commission stated that the keystone of the doctrine is the right of the public to be informed and to hear conflicting views on issues of public importance. Therefore, "Where a licensee permits the use of its facilities for the expression of views on controversial local or national issues, he must afford reasonable opportunities for the presentation of contrasting views by spokesmen for other responsible groups." The Commission said the licensee may in its discretion decide upon a local rather than a regional or national spokesperson, but in any event, the public must be given the right to hear contrasting views. 15/

8/ rev'd John M. Norris (WGCB), 1 FCC 2d 934, recon. denied, 1 FCC 2d 1587, aff'd sub nom. Red Lion Broadcasting Co. Inc. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), 395 U.S. 367 (1969).

9/ Living Should Be Fun, 33 FCC 101 (1962).

10/ Paul E. Fitzpatrick, 40 FCC 443 (1950); California Democratic State Central Committee, 40 FCC 501 (1960); Boalt Hall Students Association, 20 FCC 2d 612 (1969).

11/ Storer Broadcasting Co., 11 FCC 2d 678 (1968), recon. denied, 12 FCC 2d 601 (1968); see also, Eugene T. Gualco, 38 FCC 2d 307 (1972); Ronald Reagan, 38 FCC 2d 314 (1972).

12/ Phillip H. Schott, 25 FCC 2d 729 (B/c Bur. 1970).

13/ Spartan Radiocasting Co., 33 FCC 765, 771, 802-803 (1962).

14/ WIYN Radio, Inc., 53 FCC 2d 428, 435 (1975). The following is the history of the WIYN Radio, Inc. cases before the Commission and the Courts: Notice of Apparent Liability, 31 FCC 2d 67 (1971); Order of Forfeiture, 35 FCC 2d 175 (1972); Denial of Application for Remission of Forfeiture, 52 FCC 2d 722 (1975); Short Term renewal of license, 53 FCC 2d 428 (1975); Denial of Petition for Reconsideration of WIYN's Application for Remission of Forfeiture, 56 FCC 2d 722 (1975); Order of payment of forfeiture, 464 F. Supp. 101 (N.D. Ga. 1979); Judgment requiring payment of forfeiture reversed, 614 F. 2d 495 (5th Cir. 1980)

15/ Cullman Broadcasting Co., Inc., 40 FCC 576, 577 (1963).

6. Elections and Ballot Propositions. Unless highly unusual circumstances exist, elections of public officials and votes on ballot propositions by their very nature raise controversial issues of public importance. One licensee asserted that it had regarded a school levy as "one of several essentially noncontroversial issues" to be voted upon. However, the Bureau ruled that the evidence submitted by the complainant demonstrated the controversial nature of the school levy issue, and stated:

> The existence of an issue on which the community is asked to vote must be presumed to be a controversial issue of public importance, absent unusual circumstances not here present. It is precisely within the context of an election that the Fairness Doctrine can best be utilized to inform the public of the existence of and basis for contrasting viewpoints on an issue about which there must be a public resolution through the election process. 16/

7. "Editorial" and "Institutional" Advertisements. In its Fairness Report cited above, the Commission considered the question of "editorial" and "institutional" advertisements. It stated on p. 22 that the Fairness Doctrine certainly applies to paid announcements that "consist of direct and substantial commentary on important public issues." The FCC noted, however, that "Editorial advertisements may be difficult to identify if they are sponsored by groups which are not normally considered to be engaged in debate on controversial issues." It stated that the problem is most likely to arise "in the context of promotional or institutional advertising." Such advertising ordinarily does not involve debate on public issues, but in some cases "the advertiser may seek to play an obvious and meaningful role in public debate" (p. 23). The Commission cited the so-called "ESSO" case 17/ as an example of an advertisement which appeared to have discussed public issues "but which did not explicitly address the ultimate matter in controversy." In that case the Commission found that commercials sponsored by the Standard Oil Company advocated one side of a controversial issue involving construction of the Alaskan pipeline. "The advertisements did not explicitly mention that pipeline, but they did present what could be termed arguments in support of its construction." The Commission said it expected its licensees:

> ... to do nothing more than to make a reasonable, common-sense judgment as to whether the 'advertisement' presents a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance. This determination cannot be made in a vacuum; in addition to his review of the text of the ad, the licensee must take into account his general knowledge of the issues and arguments in the ongoing public debate. Indeed, this relationship of the ad to the debate being carried on in the community is critical. If the ad bears only a tenuous relationship to that debate, or one drawn by unnecessary inference, the Fairness Doctrine would clearly not be applicable.

The Commission went on to state that the Fairness Doctrine would apply if the relationship between the ad and the public debate were substantial and obvious:

> For example, if the arguments and views expressed in the ad closely parallel the major arguments advanced by partisans on one side or the other of a public debate, it might be reasonable to conclude that one side of the issue involved had been presented, thereby raising Fairness Doctrine obligations. 18/

The foregoing discussion has dealt only with advertisements which advocate one side of a controversial issue of public importance. As will be explained in par. 13, below, the Fairness Doctrine does not apply to advertisements which merely promote the use or sale of commercial products or services, nor does it apply to institutional or promotional ads which merely contain "puffery" and do not "obviously address and advocate a point of view on a controversial issue of public importance."

8. Other Broadcasts That do not Explicitly Refer to an Issue. The principles set forth above apply not only to paid advertisements but to all broadcasts which deal with a controversial issue of public importance without explicitly mentioning the specific issue. For example, a referendum may be approaching on a school bond issue. Speaker A appears on a station and states that the school system needs more money for equipment and the construction of new facilities (two of the purposes for which the school bonds are proposed) without mentioning the bond issue or the upcoming referendum. Speaker B appears on another station and, also without explicitly referring to the approaching vote on the bond issue, asserts that the school system should operate within its present financial limitations. In both cases, the licensees would be called upon to determine whether the speakers "had in an obvious and meaningful fashion presented a position on the ultimate controversial issue of whether the school bond issue should be approved." The Commission has stated:

16/ King Broadcasting Co. (KING-TV), 23 FCC 2d 41, 43 (B/c Bur. 1970); see, also, Lincoln Smith, 23 FCC 2d 45 (B/c Bur. 1970); Aberdeen Broadcasting Co., 38 FCC 2d 461 (B/c Bur. 1972); Fairness Report, p. 31. For cases involving elections of public officials, see U.S. Labor Party, 57 FCC 2d 1273 (B/c Bur. 1976); American Independent Party, 62 FCC 2d 4, 12 (1976).

17/ National Broadcasting Co., 30 FCC 2d 643 (1971).

18/ For other "editorial advertising" cases, see Media Access Project, 44 FCC 2d 755 (1973); Energy Action Committee, 64 FCC 2d 787 (1977); Public Media Center, 59 FCC 2d 494 (1976), remanded sub nom. Public Media Center v. FCC, 587 F.2d 1322 (D.C. Cir. 1978), on remand, 72 FCC 2d 776 (1979).

The licensee's inquiry should focus not on whether the statement bears some tangential relevance to the school bond question, but rather, on whether that statement, in the context of the ongoing community debate, is so obviously and substantially related to the school bond issue as to amount to advocacy of a position on that question. If, for example, any arguments and views expressed over the air closely parallel the major arguments advanced by partisans on one side or the other of the public debate it might be reasonable to conclude that there had been a presentation on one side of the ultimate issue; i.e., authorization of the school bonds. 19/

19/ Fairness Report, pp. 13-13.

Other Examples of Controversial Issues

9. This primer obviously can refer specifically to only a small percentage of the many fairness cases on which the Commission has ruled. However, in addition to the cases cited above in which controversial issues of public importance were found to exist, 20/ a few other illustrative examples are given below.

20/ For example, see preceding citations of Red Lion Broadcasting Co., Living Should be Fun, Paul H. Fitzpatrick, Phillip M. Schott, Spartan Broadcasting Co., Cullman Broadcasting Co., WITH Radio, Inc., King Broadcasting Co., National Broadcasting Co., Media Access Project.

(a) Issue of Constructing a Nuclear Power Plant. A station broadcast a program sponsored by a company that was building a nearby nuclear power plant. The editorial was favorable to the project. In response to a fairness complaint, the licensee stated that it did not believe that "the dangers of radiation and/or thermal pollution resulting from the construction of a nuclear power plant" constituted a controversial issue of public importance. The Bureau stated that "In the light of the national discussion of and debate over the use of atomic power and possible pollution of water and atmosphere by nuclear power plants, the licensee's initial determination that the building of a power plant within its viewing area was not a controversial issue of public importance does not appear to have been reasonable." 21/

21/ Mary Sinclair (B/c Bur. WMAL-TV), 26 FCC 2d 594, 596 (1970); see, also, Robert F. Philip, 41 FCC 2d 606 (B/c Bur. 1973).

(b) Charges Against Local Government. The Commission found unreasonable the judgment of a licensee which claimed that no controversial issue of public importance had been raised when the president of the licensee broadcast charged that the County Board had wasted public money, used county pickup trucks for "taxi service" and engaged in a "giveaway" of public land in violation of the Veterans Preference Law. He also had criticized official actions of the Governor and state legislature and had demanded that taxes be reduced. 22/

22/ WCMP Broadcasting Co., 41 FCC 2d 301 (1973).

(c) "Gay Rights" Legislation. During a religious program, two speakers on a San Francisco station advocated the defeat of legislation to protect the rights of homosexuals in housing and employment. The licensee in effect denied that such advocacy had constituted a presentation of one side of a controversial issue of public importance. It contended that "despite the clear political implications of her rhetoric, Ms. Bryant [one of the speakers] expressed herself in religious terms" and "any other-side presentation instigated by this Commission would constitute, at least in part, a government enforced statement of a religious point of view." The licensee argued that "while all religious discussion finds both sources and effect in the political and social spheres of influence," once these discussions are "couched in Biblical and religious terms and issued from a primarily religious forum, they constitute religious views" which "should not be regulated by civil tribunals." The Commission stated that although it had not held that the Fairness Doctrine is applicable per se to the broadcast of church services, devotions, prayers or other material of this nature, such programs can include vigorous expressions of views on genuinely controversial issues. From the evidence submitted by the complainants about the widespread publicity and public debate generated by the question of the civil rights of homosexuals, the Commission concluded that "the licensee's determination that the discussion ... did not constitute one side of a controversial issue of public importance or that it failed to fall within the purview of the Fairness Doctrine because it was 'couched in Biblical and religious terms' constituting 'religious views' is unreasonable." 23/

23/ Council on Religion and the Homosexual, Inc. (KSOF-TV), 68 FCC 2d 1500, 1501, 1506 (1978).

(d) Urging Listeners Not to Vote. Under the unusual circumstances of one case, the Commission ruled that a station which sold time to an organization urging listeners to vote for a bond issue had not complied with the Fairness Doctrine when it refused to present a viewpoint that citizens should not vote on the issue at all. This was because the law of the state required that more than 50 percent of qualified voters cast ballots in a bond election in order for the election to be valid, and the person who sought to urge the public not to vote was, as he had informed the station, seeking to defeat the bond issue through this device. Thus, in essence, his argument favored one side of a controversial issue of public importance. 24/

24/ Andrew B. Letson (WMOP), 40 FCC 507 (1962).

What Is Not a Controversial Issue of Public Importance

10. Thus far, Section C of Part III of the Primer has dealt with many cases in which a controversial issue of public importance was found to be present. However, in hundreds of other cases, the Commission has upheld the judgment of the licensees that no such issue existed.

11. "More Passing Reference" to Issue. One category of cases to which the Commission has refused to apply the obligations of the Fairness Doctrine is that in which there is only a passing reference to an issue or its mention is merely incidental to the discussion of the principal subject of the program. In one of the leading cases of this kind, a network news program presented a series of "mini-documentaries" on hazards caused by air congestion near airports. The Aircraft Owners and Pilots Association alleged that one episode of the series presented one side of a controversial issue of public importance by implying that private pilots and general aviation are a principal cause of mid-air collisions, as compared to commercial pilots. The Commission ruled that the network had not been unreasonable in claiming that the question of private vs. commercial pilots was at most a mere "sub-issue." The FCC stated that "If every statement, or inference from statements or presentations, could be made the subject of a separate and distinct fairness requirement, the doctrine would be unworkable. More important ... such a policy of requiring fairness on each statement or inference from statements would involve this agency much too deeply in broadcast journalism." 25/ Similarly, the Bureau found that the mention of fluoridation of water in only three of sixty sentences devoted to a discussion of dental care did not require a judgment that the remarks constituted discussion of a controversial issue of public importance. 26/ In another case, the Commission refused to find unreasonable a licensee's judgment that references to God in the Pledge of Allegiance and in saying grace did not constitute the broadcast "of a particular viewpoint on the controversial issue of public importance." 27/ In still another case, the Commission upheld a network's judgment that references by a commentator to the Subversive Activities Control Board were only incidental to a discussion of another subject and therefore did not raise the allegedly controversial issue of the continued existence of the Board. 28/

12. Number of Persons Affected by Issue. A broadcaster decided that an election at a nearby military base to determine which of two government employees' unions would represent 1,230 civilian employees of the base was not a controversial issue of public importance in the station's listening area, which had a population of more than 200,000 persons. The Commission upheld the Bureau's ruling that it could not find the licensee unreasonable in making this decision. 29/

13. Ads for Commercial Products or Services. In its 1974 Fairness Report 30/ the Commission announced that it would thereafter not apply the Fairness Doctrine to commercials which merely advertise a product or service:

> In the absence of some meaningful or substantive discussion, such as that found in the "editorial advertisements" referred to above, we do not believe that the usual product commercial can realistically be said to inform the public on any side of a controversial issue of public importance. It would be a mistake to consider standard advertisements ... as though they made a meaningful contribution to public debate.... Accordingly, in the future, we will apply the Fairness Doctrine only to those "commercials which are devoted in an obvious and meaningful way to the discussion of public issues.

In one of the leading cases of this kind, 31/ a TV advertisement claimed that Chevron gasoline would reduce exhaust emissions and contribute to cleaner air. The Commission found that although the claim related to a matter of public concern (air pollution), the ads did not engage in an obvious and meaningful discussion of a controversial issue of public importance. The FCC stated at p. 812 that:

> ... making a claim for a product is not the same thing as arguing a position on a controversial issue of public importance. That the claim is alleged to be untrue or partially deceptive does not change its nature.... It would ill suit the purposes of the Fairness Doctrine, designed to illumine significant controversial issues, to apply it to claims of a product's efficacy or social utility. The merits of any one gasoline, weight reducer, breakfast cereal or headache remedy--to name but a few examples that come readily to mind--do not rise to the level of a significant public issue.... We think this conclusion is required not only as a matter of reason, but also of practical necessity if fairness is to work for the public and not to its detriment.

Other product advertising cases in which the Bureau and the Commission refused to apply the Fairness Doctrine included commercials for snowmobiles, 32/ trash compactors, 33/ and Crest toothpaste. 34/

25/ National Broadcasting Co., 25 FCC 2d 735, 736 (1970); see, also, David I. Caplan, 38 FCC 2d 1027, 1031 (B/c Bur. 1973); Club Palomch Rifle and Pistol Club (WHBC-TV), 43 FCC 2d 411 (B/c Bur. 1973); John P. McGaff, 33 FCC 2d 286 (B/c Bur. 1975); Saul Jakel, 61 FCC 2d 741 (B/c Bur. 1976), review denied, September 21, 1977 (FCC 77-654).

26/ Clinton H. Miller (NBC), 26 FCC 2d 920 (B/c Bur. 1970).

27/ Robert H. Scott (KTUV), 19 FCC 2d 920 (B/c Bur. 1969), recon. denied, 25 FCC 2d 239 (1970); see, also, Anthony R. Martin-Trigona (WLS), 19 FCC 2d 620 (1969), recon. denied, 22 FCC 2d 683 (1970).

28/ Gary Lane (NBC), 38 FCC 2d 45 (B/c Bur. 1972), review denied, 39 FCC 2d 938 (1973); see also, William K. Erickson (WSMA-TV), 34 FCC 2d 604 (B/c Bur. 1972), review denied, 39 FCC 2d 557 (1973).

29/ National Association of Government Employees, 39 FCC 2d 1059 (B/c Bur. 1973), review denied, 41 FCC 2d 965 (1973).

30/ 48 FCC 2d 1, 26 (1974).

31/ Alan F. Neckritz, 29 FCC 2d 807 (1971), recon. denied, 37 FCC 2d 528 (1972), aff'd sub nom. Neckritz v. FCC, 502 F.2d 411 (D.C. Cir. 1974).

32/ Sierra Club (WBCB-TV), 40 FCC 2d 119 (B/c Bur. 1973); Peter C. Herbst, 40 FCC 2d 115 (B/c Bur. 1973), review denied, 48 FCC 2d 414 (1974), recon. denied, 49 FCC 2d 411 (1974).

33/ John S. Maclonie (KCO-TV), 32 FCC 2d 857 (B/c Bur. 1971).

34/ John Yiamouyiannis, 58 FCC 2d 314 (B/c Bur. 1976).

14. False and Misleading Advertising. Some persons have sought to apply the Fairness Doctrine to product advertising because it is allegedly false or misleading. In fact, this was one of the bases for the Fairness Doctrine complaint against the Chevron gasoline commercials described in the preceding paragraph. However, in its Fairness Report at pp. 27-28, the Commission stated:

> We do not believe that the Fairness Doctrine provides an appropriate vehicle for the correction of false and misleading advertising. The Fairness Doctrine is only one aspect of the public interest. A Congressionally-mandated remedy for deceptive advertising already exists in the form of various [Federal Trade Commission] sanctions. If an advertisement is found to be false or misleading, we believe that the proper course is to ban it altogether rather than to make its claims the subject of a broadcast debate. One Fairness Doctrine complaint was based on toy commercials which had been the subject of an official Federal Trade Commission complaint. The Commission declined to apply the Fairness Doctrine to the commercials and noted that "as the Federal Trade Commission has stated, the issuance of such a complaint as that against the toy advertisers 'does not imply adjudication of the matters charged.'" 35/

35/ Action for Children's Television, Inc., 27 FCC 2d 275 (1970).

Other Cases Where No Controversial Issue Found

15. Complainants have at various times sought to apply the Fairness Doctrine to an almost infinite variety of subjects mentioned or discussed on the air. Additional examples of cases in which the Commission has upheld a licensee's decision that no controversial issues of public importance had been presented include the following:

(a) Bullfighting. The CBS "Sixty Minutes" program presented a segment on bullfighting. In response to a fairness complaint, the network replied that in its opinion, the broadcast did not involve a controversial issue of public importance. The Bureau stated that it had been informed that bullfights are illegal in every state of this country and it had no evidence that a controversial issue of public importance presently existed as to whether bullfighting should be presented in the United States. Therefore, it was unable to find that CBS had been unreasonable in its decision. 36/

(b) Belief in Evolution. A complainant stated that stations in Rochester and Buffalo, New York had broadcast material on one series of programs opposing the theory of evolution and that since he had heard no pro-evolutionist material on the stations, they had violated the fairness doctrine. The stations replied that they did not believe that evolution was a controversial issue of public importance in their cities at the time of the broadcasts. The Commission stated that on the basis of the information given in the complaint and the responses of the stations, it did not appear that the licensees had acted unreasonably or in bad faith. It added that "The mere presentation of programs discussing anti-evolutionary matter ... does not in and of itself establish presentation of a controversial issue of public importance." 37/

(c) Social Security Law; Rubella Vaccine. A complainant sought time to express his views on the Social Security Law. The stations rejected his request on the ground that on the broadcast in question, the local Social Security official had merely explained the Social Security Law as it existed in order to familiarize listeners with its regulations, rather than advocating or opposing the law. The Bureau found the judgment of the broadcasters reasonable in concluding that the broadcasts had not advocated one side of a controversial issue. 38/ In a somewhat similar situation, the Bureau upheld the licensee's judgment that an editorial which did not advocate mass immunization of children with rubella vaccine but merely urged viewers to contact their physicians about it did not incur Fairness Doctrine obligations. 39/

(d) Effect Upon an Issue of the Passage of Time. A subject that once was a controversial issue of public importance may no longer be one because of the passage of time. Thus, the Commission upheld the judgment of a licensee that the discussion in 1972 of the World War II relocation of Japanese-Americans from the Pacific Coast to inland areas no longer involved a controversial issue of public importance. 40/ The same conclusion was reached with respect to an interview with Alger Hiss about his conviction for perjury, which had taken place 20 years earlier, 41/ the controversial nature and public importance in 1974 of American support for the Nationalist Chinese government during and immediately following the Second World War, 42/ and the controversial nature in 1978 of an alleged issue of whether Germany had a policy of Jewish extermination during the same war. 43/

(e) Curved Space, Abstract Expressionism, Polish Jokes. One complainant

36/ Lyn A. Sherwood (CBS), 27 FCC 2d 201 (B/c Bur. 1971).

37/ David S. Tillson (WHAM and WGR-TV), 24 FCC 2d 297, 298 (1970). For a case in which a fairness complaint based on alleged pro-evolutionary broadcasts on a station was denied, see Mrs. H. B. Van Velzer, 38 FCC 2d 1044 (B/c Bur. 1973).

38/ Evan H. Foreman, (WALA-TV, WABB), 24 FCC 2d 303 (B/c Bur. 1969).

39/ Sheila Soave (WKBC-TV), 23 FCC 2d 60 (B/c Bur. 1970).

40/ Kilsoo Haan (KGO), 37 FCC 2d 947 (B/c Bur. 1972), review denied, 39 FCC 2d 461 (1973).

41/ Accuracy in Media, Inc., 47 FCC 2d 426 (B/c Bur. 1973), review denied, FCC 73-1197.

42/ Accuracy in Media, Inc., 46 FCC 2d 941 (B/c Bur. 1974).

43/ Friedrich P. Berg, 71 FCC 2d 387 (1978), review denied, 71 FCC 2d 385 (1979), recon. denied, 79 FCC 2d 588, (1980).

sought to answer a broadcast discussion of the Einstein concept of "curved space." 44/ Another requested time to reply to a broadcast that had referred favorably to "abstract expressionism in art." 45/ Still another sought to apply the Fairness Doctrine and the personal attack rule to so-called "Polish jokes." 46/ In each case, the Bureau and/or the Commission found the licensee had not been unreasonable in deciding that the broadcast had not involved discussion of a controversial issue of public importance. For example, in the Einstein "curved space" case, the Bureau said that while the various theories of "curved space" might be considered newsworthy, the complainant had furnished no evidence which would indicate that they had aroused the "vigorous debate with substantial elements in the community in opposition to one another," which the Commission stated in its Fairness Report was a primary consideration in determining the controversiality of an issue.

(f) Controversies in Other Countries. As noted in par. 5 above, an issue may be controversial and of public importance in one geographical area but not another. This question frequently has arisen following a broadcast about a situation in a foreign country or a controversy between two or more foreign countries. The Commission has held that such foreign disputes do not create fairness obligations for an American station unless there is a controversy in the United States as to what our government's policy should be with respect to the other country or countries. The Commission stated in one case that "when the Arab-Israeli conflict involves the question of U.S. relations with respect to Israel and the Arab countries, that question is clearly a controversial issue of public importance in this country." 47/ In two cases where complainants alleged unfairness in coverage of the conflict in Northern Ireland, the Commission ruled that the licensees had been reasonable in concluding that no controversial issue had been shown to exist in this country with respect to the events in question. 48/ It stated:

> ... unless events in a foreign country involve the question of United States relations or involvement with respect to that country, and in the absence of evidence that a controversial issue of public importance exists in this country regarding such matters, it would not be unreasonable for a licensee to conclude that its coverage of such events does not present a controversial issue of public importance within the meaning of the Fairness Doctrine.

(See, also, par. 5 above regarding the geographical factor.)

(g) School Desegregation. A complainant alleged violation of the Fairness Doctrine because he was denied time to oppose court-ordered school desegregation and to urge the public not to cooperate with school officials. The complaint was based on a station editorial which the broadcaster did not believe presented a position on a controversial issue of public importance because the editorial "neither endorsed nor opposed the Supreme Court order to which it referred" but rather "simply [urged] lawful conduct and cooperation with school officials in a very difficult situation." The Bureau found that the station had not acted unreasonably in refusing the complainant's request for time to respond to the editorial. 49/

(h) Institutional or Promotional Advertising. Par. 7 above explains that "editorial" or "institutional" advertisements fall within the scope of the Fairness Doctrine if they present "a meaningful statement which obviously addresses, and advocates a point of view on, a controversial issue of public importance." However, some institutional or promotional ads merely seek to improve the image of an industry or a member of the industry by means of self-praise or puffery and therefore do not raise Fairness Doctrine questions. One complainant alleged that the Fairness Doctrine should apply to two sets of announcements broadcast by an ABC network station. One set of announcements promoted the American Broadcasting Company and various enterprises owned by it. The announcements stated, among other things, that "there's a lot more to the American Broadcasting Companies than broadcasting" and "We're not quite as simple as ABC." The other set of announcements was distributed by the National Association of Broadcasters (NAB). They recited the services performed by "free, commercially-sponsored television," such as coverage of news and sports events. The complainant asserted that the ABC announcements attempted to establish that company as a "benign entertainment conglomerate" and that "conglomerates qualify as one of the most important and discussed issues in the United States today" and thus were "a controversial issue of public importance." The complainant claimed that the NAB announcements were "part of a knowing and concentrated attack by NAB on pay TV" and that pay television was a controversial issue of public importance within the scope of the Fairness Doctrine. The Commission found that neither set of announcements properly could be termed advocacy of one side of a controversial issue of public importance within the scope of the Fairness Doctrine. It stated:

44/ Morton Schwartz (WNBC-TV, WNET-TV), 52 FCC 2d 596 (B/c Bur. 1975).

45/ Margaret K. Stucki (WCBS-TV), 44 FCC 2d 597 (B/c Bur. 1973), review denied, FCC 74-272.

46/ Thaddeus L. Kowalski (ABC), 42 FCC 2d 1110 (B/c Bur. 1973), review denied 46 FCC 2d 124 (1974), aff'd sub nom. Polish-American Congress v. FCC, 520 F.2d 1248 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976).

47/ J. Allen Carr (WMAQ-TV, WBBM-TV), 30 FCC 2d 894, 896 (1971).

48/ J. F. Branigan (CBS), 31 FCC 2d 490, 491 (B/c Bur. 1971); Los Angeles Irish Coalition for Fairness in the Media (KNX, KNXT-TV), 30 FCC 2d 319, 320 (B/c Bur. 1974), review denied, 52 FCC 2d 681 (1975).

49/ John S. Warchak (WHAZ-TV), 23 FCC 2d 289 (B/c Bur. 1970).

> The Fairness Doctrine is designed to assure a full and fair opportunity for the American people to be informed on controversial issues of public importance. The strained attempt to apply it to institutional or promotional advertisements of this nature must be rejected as not promoting that fundamental purpose, but rather as being disruptive of the commercially based broadcast system.

As for the NAB commercial TV promotional plugs, the Commission pointed out that there was no reference to pay TV in any of them and stated that "This praise of commercial television by a commercial television licensee cannot be regarded as clear criticism of pay television or a claim of supremacy over pay television for purposes of the Fairness Doctrine." 50/

(i) Meat vs. Vegetarian Diet. A complainant alleged that a physician and a dietician had advocated eating meat and disparaged vegetarian diets in a broadcast. The Commission stated that it could not find unreasonable the licensee's judgment that meat-versus-vegetarian diets did not amount to a controversial issue of public importance in its community, and that the complainant had furnished no evidence of debate or controversy in the community such as to create such an issue. The Commission said that although there appeared to be "a considerable divergence of opinion among dieticians and nutritionists as to the effect of meat diets ... such references do not in and of themselves indicate that there is a cognizable public controversy on these dietetic subjects. Absent such indication of public controversy, the Commission will not overturn the judgment of a licensee. The issue is not whether the Commission would have decided the question differently, but whether the licensee has been arbitrary or unreasonable in its judgment." 51/

(j) Armed Forces Recruiting Announcements. Three complainants made demands on various stations for opportunities to present contrasting views to those in armed forces recruiting messages. The stations denied that the public service announcements urging volunteer enlistment had raised any controversial issue of public importance. The complainants cited the current American participation in the Vietnam War as a controversial issue. The Commission upheld the position of the stations inasmuch as the announcements made no mention of the Vietnam conflict, "the power of the Government to raise an army has not been questioned," and "we do not believe that the broadcast of Armed Forces recruitment messages, any more than similar recruitment messages for firemen, teachers, census enumerators, peace corps volunteers, etc., in and of itself, raises a controversial issue of public importance." 52/

(k) "Husband-beating." The Commission also has ruled that a complainant had failed "to prove that NBC was unreasonable in concluding that the 'extent of husband-beating in America today' is not a 'controversial issue of public importance' within the meaning of the Commission's Rules and Regulations." 53/

D. WHAT ARE A STATION'S OBLIGATIONS RE PRESENTING CONTRASTING VIEWS?

As has been stated in preceding parts of this Primer, a broadcaster who presents one side of a controversial issue of public importance has a duty to try to bring about the airing of all significant contrasting viewpoints on that issue--a duty that goes beyond merely waiting for someone to demand a chance to broadcast an opposing view. 1/ The Commission never has laid down a fixed formula for meeting this obligation. As with other aspects of the Fairness Doctrine, it tries to rely on the reasonable, good-faith judgment of the licensees. However, the FCC has given examples of some acceptable ways of encouraging the broadcast of different viewpoints on an issue. In one case, 2/ it said:

> The mechanics of achieving fairness will necessarily vary with the circumstances, and it is within the discretion of each licensee, acting in good faith, to choose an appropriate method of implementing the policy to aid and encourage expression of contrasting viewpoints. Our experience indicates that licensees have chosen a variety of methods, and often combinations of various methods. Thus, some licensees, where they know or have reason to believe that a responsible individual or group within the community holds a contrasting viewpoint with respect to a controversial issue presented or to be presented, communicate to such an individual or group a specific offer of the use of their facilities for the expression of contrasting opinion, and send a copy or summary of material broadcast on the issue. Other licensees consult with community leaders as to who might be an appropriate individual or group for such a purpose. Still others announce at the beginning or ending (or both) of programs presenting opinions on controversial issues that opportunity will be made available for the expression of contrasting views upon request by responsible representatives of such views.

50/ Anthony R. Martin-Trigona (WLS), 19 FCC 2d 620, 621-22 (1969); see, also, United Church of Christ (KHHV), 42 FCC 2d 874 (B/c Bur. 1973).

51/ American Vegetarian Union (WLWD), 38 FCC 2d 1024, 1026 (B/c Bur. 1972), review denied 45 FCC 2d 1038 (1973); see, also, Nellie Shriver, 46 FCC 2d 1121 (B/c Bur. 1974).

52/ Donald A. Jelinek, 24 FCC 2d 156, 157 (1970); David C. Green, 24 FCC 2d 171 (1970), aff'd sub nom. Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971); Alan F. Neckritz, 24 FCC 2d 175 (1970).

53/ Letter to Robert Langley (NBC), September 29, 1978, review denied by Memorandum Opinion and Order adopted July 12, 1979 (FCC 79-435). Denial of complaint was also based on the fact that the alleged "attack" was made during commentary contained in a news program.

1/ Editorializing Report, 13 FCC 1246, 1251 (1949); see also, John J. Dempsey (KOB), 40 FCC 443 (1950); Metropolitan Broadcasting Corporation, 40 FCC 491 (1959).

2/ Mid-Florida Television Corporation, 40 FCC 620, 621 (1964).

However, the Commission also has said:

> If the licensee fails to present an opposing viewpoint on the ground that no appropriate spokesman 3/ is available, he should be prepared to demonstrate that he has made a diligent, good-faith effort to communicate to such potential spokesmen his willingness to present their views on the issue or issues presented. Columbia Broadcasting System, Inc., 34 FCC 2d 773 (1972). There may well be occasions, particularly in cases involving major issues discussed in depth, where such a showing should include specific offers of response time to appropriate individuals in addition to general over-the-air announcements. 4/

3/ For further discussion of "appropriate spokesperson" see par. 6 below.

4/ Fairness Report, 48 FCC 2d 1, 14 (1974).

1. Sometimes More than Two Viewpoints. In seeking to bring about the broadcast of contrasting views, a licensee should remember that an issue may involve more than two important viewpoints. When evaluating the various contrasting viewpoints on an issue, the broadcaster should try to identify the major ones being debated in the community and "make provision for their presentation." In most cases there may be only two significant viewpoints but in others, there may be "a range of markedly different and important policy alternatives." 5/

5/ Fairness Report, pp. 14, 15.

2. Need Not Present "Every Conceivable Point of View." Although as stated above there may be more than two significant viewpoints on an issue, "A licensee is not required to present every conceivable point of view regarding an issue," especially when a complainant has failed to provide evidence that his or her view is significant and in contrast to those already broadcast by the station. 6/ Also, see par. 11 of Section C above ("mere passing reference" to an issue).

6/ Salem D. Caplan (KHKT), 27 FCC 2d 199, 200 (B/c Bur. 1971).

3. Licensee May Not Rely on Other Media. A broadcaster who presents one side of a controversial issue cannot justify failure to try to present contrasting views by claiming that other media, such as newspapers, magazines or even other broadcasting stations in the area have presented the contrasting views. The Fairness Doctrine applies to each station individually, "irrespective of the position which may be taken by other media on the issue involved...." 7/ In discussing this aspect of the fairness obligation in the Fairness Report, the Commission stated at p. 11:

7/ WSOC Broadcasting Company, 40 FCC 468, 469 (1958).

> While we recognize that citizens receive information on public issues from a variety of sources, other considerations require the rejection of this suggestion. First, in amending Section 315(a) of the Communications Act in 1959, Congress gave statutory approval to the Fairness Doctrine, including the requirement that broadcasters themselves provide an opportunity for opposing viewpoints.... Second, it would be an administrative nightmare for this Commission to attempt to review the overall coverage of an issue in all of the broadcast stations and publications in a given market. Third, and perhaps most importantly, we believe that the requirement that each station provide for contrasting views greatly increases the likelihood that individual members of the public will be exposed to varying points of view. The Fairness Doctrine will not insure perfect balance in debate and each station is not required to provide an "equal" opportunity for opposing views. Furthermore, since the Fairness Doctrine does not require balance in individual programs or series of programs, but only in a station's overall programming, there is no assurance that a listener who hears an initial presentation will also hear a rebuttal....
>
> However, if all stations presenting programming relating to a controversial issue of public importance make an effort to round out their coverage with contrasting viewpoints, these various points of view will receive a much wider public dissemination. This requirement, of course, in no way prevents a station from presenting its own opinions in the strongest terms possible.

However, a licensee may rely upon views expressed on network programs which it carries which are in opposition to those presented on the station's local programs, since network programming is a part of the station's own output. 8/

8/ Capital Broadcasting Company, Inc., 40 FCC 615, 616 (1964).

4. Cannot Rely on Chance That Someone Will Volunteer an Opinion. A licensee which presents one side of a controversial issue may not rely upon the chance that someone will call in during an "open mike" program to express a contrasting view:

> The Fairness Doctrine imposes upon licensees a responsibility on behalf of the public's right to hear contrasting views, and this responsibility is not exercised by leaving the expression of contrasting views to such happenstance as the remarks of an unknown person on a call-in program, or the possibility that a pertinent question will be asked on a general interview program unannounced as dealing with any particular issue and not presenting a guest selected as a responsible spokesman of a contrasting view. 9/

9/ Brandywine-Main Line Radio, Inc., 27 FCC 2d 565, 567 (1971).

5. Licensee Cannot Delegate Fairness Responsibility to Others. The licensee is responsible for compliance with the Fairness Doctrine and may not

delegate that responsibility to a third party, such as the conductor of a commentary or call-in program. 10/ This is especially true when the person conducting or moderating the program uses it to promote his or her own viewpoints and ridicules or otherwise discourages persons who seek to express opposing views. 11/ With respect to another type of delegation, the Commission has ruled that a licensee may not make a private agreement to give another party favored treatment when controversial issues arise in the future, or to allow that party the right to make Fairness Doctrine decisions which are the licensee's responsibility. In one such case, a political committee agreed to withdraw its complaint against a station under an agreement in which the licensee obligated itself in the future "to perform certain actions with regard to the Democratic State Central Committee" which the FCC said appeared to go "beyond the minimum requirements of the Commission's 'Fairness Doctrine.'" The Commission continued:

> Thus, the licensee promises that, when and if the station or any commentator takes an editorial position contrary to the one taken by the Democratic party, it "will afford the DSCC a right of reply" ...; that it will furnish the DSCC "with copies of all Mr. Putnam's editorials and all other editorials, whether or not they relate to issues which are the subject of political controversy" ...; that it will make available for inspection by the DSCC "the text of KTLA's newscasts during the primary and general [election] campaigns" and that "film clips and video tapes will be available for screening by the DSCC".... Other clauses specify conditions for the timing and placement of replies by the DCSS ...; limit the right of George Putnam to editorialize on the day of broadcast of a reply by the DSCC ...; provide for the labeling of editorial matter ... and specify that editorials will not be telecast by the licensee "after the Wednesday preceding election day"....

The Commission further stated:

> While a licensee may voluntarily establish for itself policies which go beyond the minimum requirements of the "Fairness Doctrine" in the presentation of views on issues of public importance, a licensee may not in doing so agree to accord one organization or group favored treatment, beyond that accorded to other responsible organizations....
>
> In its "1949 Editorializing Report" the Commission made clear that the responsibility for determining what is a controversial issue of public importance rests upon the licensee. Further, the report continues: "[T]he licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the differing shades of opinion to be presented, and the spokesmen for each point of view." (Emphasis supplied.) The memorandum you have submitted cannot relieve you of the responsibility for making day-to-day decisions as to what are controversial issues, which issues are worthy of your broadcast time, and of making a choice, using your own best judgment, as to the most appropriate spokesmen for present contrasting views on such issues.
>
> ... In considering how best to serve the needs and interests of its community in this area of programming, a licensee must be guided by the "Fairness Doctrine," rather than by any private agreement such as the "Memorandum of Understanding" here under discussion. 12/

6. No Particular Person or Group Entitled to Respond. Many fairness complaints are based on the mistaken assumption that the complainant personally is entitled to present views in contrast to those already broadcast. As the Editorializing Report (p. 1251), the Fairness Report (p. 8), and hundreds of Commission rulings have stated, no particular person or group is entitled to present a viewpoint in an ordinary Fairness Doctrine situation. Rather, it is within the discretion of the licensee to select the most appropriate spokesperson for each point of view. 13/ The two exceptions to this principle are personal attacks and political editorials which are discussed in Sections F and G below. However, although a licensee is responsible for selecting the spokespersons in a normal Fairness Doctrine situation, the decision should be made on the basis of the licensee's judgment of the significance of the proposed reply, not on whether the proposed spokesperson is a member of an organization which represents a substantial portion of the public or on the basis of what the licensee believes to be the personal motives of the party seeking to respond. "Rather, selection should be based upon licensee's obligation to afford reasonable opportunity for the presentation of contrasting views." 14/ Furthermore, as stated in the quotation near the beginning of this section from p. 14 of the Fairness Report:

> If a licensee fails to present an opposing viewpoint on the ground that no appropriate spokesman is available, he should be prepared to demonstrate that he has made a diligent, good-faith effort to communicate to such potential spokesmen his willingness to present their views on the issue or issues presented [Citing the CBS case set forth in note 14].

10/ Living Should Be Fun, 33 FCC 101 (1962).

11/ Living Should Be Fun, 33 FCC 101, 107 (1962); WINY Radio, Inc., 53 FCC 2d 428, 436-37 (1975); Brandywine-Main Line Radio, Inc., 24 FCC 2d 18, 22 (1970); Hawaiian Paradise Park Corp. (KTRG), 22 FCC 2d 459, 460 (1970).

12/ Golden West Broadcasters (KTLA-TV), 8 FCC 2d 987, 988 (1967).

13/ See for example, Committee for Fair Broadcasting, 25 FCC 2d 283, 292 (1970); Committee of One Million, 33 FCC 2d 545 (1971); John Cervase, 44 FCC 2d 744 (B/c Bur. 1974); Lynne E. Heidt, 27 FCC 2d 202 (B/c Bur. 1971).

14/ CBS, Inc. (KNX), 34 FCC 2d 773, 775, 777-8 (1972); see, also, Ted Bullard (KING TV), 23 FCC 2d 41, 44 (B/c Bur. 1970).

This is especially true when the licensee has rejected a request by one person to present the opposing viewpoint on the ground that he or she is not a responsible or appropriate spokesperson. This was the situation in the CBS case cited in the above passage and in the Ted Bullard case cited along with the CBS case in note 14 to this paragraph.

7. Licensee Should Not "Stack the Cards" in Selecting Spokespersons. Although the licensee is given wide discretion to select the persons or groups to present opposing viewpoints, the Commission assumes that it will not "stack the cards" in order to favor one viewpoint at the expense of the other. As the Commission stated in its Fairness Report, pp. 15-16:

> 40. ... it has been argued that the Commission should promulgate regulations establishing standards for the selection of an appropriate reply spokesman and format. We believe, however, that it should be adequate to remind licensees that they have a duty not "'to stack the cards' by a deliberate selection of spokesmen for opposing points of view to favor one viewpoint at the expense of the other...." Report on Editorializing, 13 FCC at 1253. In the final analysis, fairness must be achieved, "not by the exclusion of particular views because of ... the forcefulness with which the view is expressed, but by making the microphone available for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation." Id. at 1253-54. (Emphasis supplied.) See also Brandywine-Main Line Radio, Inc., 24 FCC 2d 18, 23-24 (1970).
>
> 41. In providing for the coverage of opposing points of view, we believe that the licensee must make a reasonable allowance for presentations by genuine partisans who actually believe in what they are saying. The Fairness Doctrine does not permit the broadcaster "to preside over a 'paternalistic' regime," REM, 412 U.S. at 130, and it would clearly not be acceptable for the licensee to adopt a "policy of excluding partisan voices and always itself presenting views in a bland, inoffensive manner ...." Democratic National Committee, 25 FCC 2d 216, 222 (1970). Indeed, this point has received considerable emphasis from the Supreme Court: "[N]or is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. That is not the way to do justice to the arguments, or bring them into real contact with his own mind. He must be able to hear them from persons who actually believe them; who defend them in earnest and do their very utmost for them. Red lion Broadcasting Co. v. FCC, 395 U.S. at 392, n. 18, quoting J. S. Mill, On Liberty 32 (R. McCallum ed. 1947)."
>
> 42. This does not mean, however, that the Commission intends to dictate the selection of a particular spokesman or a particular format, or indeed that partisan spokesmen must be presented in every instance. We do not believe that it is either appropriate or feasible for a governmental agency to make decisions as to what is desirable in each situation....

8. Licensee Should Not Harass Complainants. The Editorializing Report states that licensees should "encourage and implement the broadcast of all sides of controversial public issues." Harassing complainants obviously is inconsistent with this obligation, as the Commission has stated in several cases. In one, a station broadcast an editorial urging listeners to sign a petition asking President Nixon to pardon Lieutenant Calley. When the complainants went to the station and asked for a copy of the editorial, they were told they would have to request it in writing. Although they later received a copy of the editorial and their response was broadcast, the vice president and general manager of the station read their request for time on the air, identified the complainants as Indiana University professors and allegedly asked his listeners to call them at the University to give the listeners' opinions on the matter. The station vice president also called for an investigation of "what every college professor is teaching our children," suggested legal action for slander against the complainants based on their request for time, and when they requested a transcript of the program in which he made these remarks, replied that since they "were giving him a hard time ... [they] would have to request it by registered mail." The Bureau admonished the licensee, stating, in part:

> ... The Commission believes that licensees should make every effort to assure that members of the public who are seeking to express their views are in no way harassed or intimidated. In this case it appears that [the vice president of the station's] actions prior to the broadcast of the complainants' response were harassing and intimidating and could well have had a chilling effect on the complainants' attempts to air their views ... [these] actions did not further your obligation to encourage "robust, wide-open debate" on controversial issues of public importance. 15/

9. "Special Duty" When Licensee's Own Interest Involved. In letters to two television stations about a complaint that they had not complied with the Fairness Doctrine in broadcasts about CATV, the Commission stated that "a licensee which presents its viewpoint on a matter in which it is personally involved, has a particular duty to insure that the requirements

15/ Frederick B. Cherry (WLTH), 32 FCC 2d 461, 462-3 (B/c Bur. 1971); see, also, Hawaiian Paradise Park Corp., 22 FCC 2d 459 (1970); Statesville Broadcasting Company, 23 FCC 2d 872 (B/c Bur. 1970).

of fairness are satisfied." However, in its reconsideration of the Fairness Report, the Commission overruled these cases. It stated, with respect to evaluating the reasonableness of a licensee's judgment:

> The Commission's standard of review allows great discretion to the licensee and does not vary depending upon the particular case being reviewed. It has been suggested in the past that we abandon our established standards where the licensee has a financial interest concerning a controversial issue of public importance. That we cannot do. The Commission has adequate means to deal with licensees who use their facilities to gain commercial advantage in other enterprises, and who in other ways abuse their public interest. The Fairness Doctrine is not the proper vehicle for such enforcement nor is it the most effective. Such overbroad use of the doctrine would undermine its effective use where it is most needed. We adhere to the policy set forth in Public Communication Inc., 50 FCC 2d 395 (1974).... 16/

16/ See Reconsideration of the Fairness Report, 58 FCC 2d 691 at 697, Note 9 (1976). The Public Communication case overruled pertinent parts of WBRR-TV, Inc., 1 FCC 2 833, 834 (1965); Taft Broadcasting Co. (WHBF-TV), 1 FCC 2d 835 (1965). See, also, Emerson Stone, Jr., 40 FCC 385 (1964).

10. What is a Reasonable Opportunity for Response? There can be no fixed formula for determining what a "reasonable opportunity for response" is after a station has presented one side of a controversial issue of public importance. Circumstances vary from case to case, and many factors may have to be considered in a particular situation. As stated in preceding parts of this Primer, neither "equal time" nor "equal opportunities" are required in fairness cases, nor must a contrasting view be presented on the same day or the same program or even the same series of programs in which the original presentation was made, provided that the station presents, or tries to present, contrasting views in its overall programming. The Commission never has attempted to fix a ratio of the amounts of time that must be devoted to conflicting viewpoints. 17/ The Commission relies, first of all, upon the good-faith, reasonable judgment of the licensee, and regardless of what the Commission itself might have decided if it had been the licensee, it will uphold the decision of the licensee unless it appears to be unreasonable or to have been made in bad faith. Although the difference between these two criteria may appear to some to be only a theoretical one, it is, in fact, real, as the court pointed out in remanding one case. 18/ Illustrative cases that have involved the reasonableness of an opportunity for response are discussed in the following sub-paragraphs:

17/ See discussion of this subject in Fairness Report, p. 17.

18/ Strauss Communications, Inc. v. FCC, 530 F.2d 1001 (D.C. Cir. 1976). See discussion of this case in par. 8 of Section F below.

> (a) Total Amount of Time, Proximity to Date of Vote, Frequency of Presentation of Contrasting Views. Although the Commission has set no fixed ratios between either total amounts of time for contrasting viewpoints or frequency of broadcasts advocating different viewpoints, it realistically must take these factors into consideration when deciding whether a licensee's judgment has been reasonable. In some cases, it also must consider the proximity of the broadcasts of different views to the approaching vote on a controversial issue, whether it be a popular vote on a referendum proposition or the vote of a city council, county board, or state or federal legislature. 19/ For example, if a station makes available to one side of an issue ten times the total amount of time that it makes available to the other side, it obviously has not promoted the cause of fairness. Since the element of repetition also is a well recognized factor in the effectiveness of broadcast presentation, the Commission must also consider the frequency with which each side is presented, not only because a repeatedly broadcast message is likely to be better remembered, but because a larger audience will be reached through repetition on different days and at different times, as radio and television advertisers have long known. Finally, if one viewpoint on a proposition is not broadcast during the last month before the vote on the proposition but the contrasting view is presented during the final days preceding election day, the latter viewpoint obviously will have more effective broadcast exposure. Following are some cases in which one or more of the elements of total time, frequency of presentation, and proximity to date of decision have been considered:

19/ The same principle would apply to an approaching decision by a public official on a controversial public issue, as in the NBC "ESSO" case cited in par. 7 of Section C above, where the decision on the Alaskan pipeline was to be made by the Secretary of the Interior.

> (1) City Charter Vote. A vote was to be taken on March 17 on adoption of a City Charter. Advocates of the Charter were given 30 minutes on March 11. Opponents were given 30 minutes on March 16. During the period March 13-17 inclusive, the station broadcast 52 editorials, each 2 1/2 minutes long, opposing the Charter. Advocates of the Charter were allowed to broadcast their response to the editorials a total of five times on March 16 and 17. The Bureau found that the licensee had not been reasonable in the opportunity accorded pro-Charter spokespersons. It based its ruling on "The imbalance in the amount of editorial time versus editorial response time, the frequency of the respective broadcasts, and the proximity of the free [30-minute] broadcast of the Charter opponents to the Charter vote...." 20/

20/ Citizens for Responsible Government (KTOW), 25 FCC 2d 73, 74 (B/c Bur. 1970).

> (2) Vote on Legalized Casino Gambling. A vote was to be taken on April 23 on legalized casino gambling. On April 19 a station presented a half-hour discussion program on which both sides were

accorded approximately equal exposure. At 10 p.m. on the eve of the referendum, the station presented a one-hour documentary on the subject titled "Forbidden Fruit" during which the licensee expressed opposition to legalizing casino gambling and in which some 47 minutes were devoted to opposition to legalized gambling and only 6 or 7 minutes to advocacy of it. The station's newscasts preceding the referendum devoted almost four times as much time to anti-gambling views as to pro-gambling views. The Bureau stated:

> Clearly, one viewpoint was given heavily predominant exposure on your overall broadcasts. In addition, "Forbidden Fruit" was presented the night before the referendum and we believe that such a one-sided broadcast presented on election eve tends to overshadow prior programming. 21/

(3) Election Eve Editorial Doesn't Necessarily Violate Fairness Doctrine. On the night before a vote on an initiative to reinstate the death penalty, a station broadcast a two-sentence editorial to the effect that crime was rising and the death penalty was needed as a deterrent. The Bureau found that, in light of the fact that the station had broadcast other viewpoints during the week preceding the vote, the broadcast of the last-minute editorial "does not, in and of itself, constitute a violation of the Fairness Doctrine, nor does such an editorial 'unbalance' or supersede all prior coverage." 22/

(b) Audience Potential of Periods in Which Views Presented. In addition to considering the amount of time allocated to contrasting views, the frequency of presentation and the proximity of presentations to the election date, the audience potential of the periods in which viewpoints are advocated is also obviously a relevant factor. As the Commission once stated, "it is patently unreasonable for a licensee consistently to present one side in prime time and to relegate the contrasting viewpoint to periods outside prime time." 23/ This does not mean that contrasting views need be presented in the same time periods or in different periods of exactly equal audience rating; only that "reasonable opportunity" be made available for presentation of contrasting viewpoints.

(c) Relationship of Contrasting Views to Those Originally Broadcast. The obligation to try to present contrasting views on controversial public issues obviously means that the "contrasting" presentations must be reasonably related to the issue involved. This is as true of the fairness obligation generally as it is with regard to personal attacks as discussed in par. 12 of Section F below. Thus, a licensee may use its reasonable, good-faith judgment in determining whether a broadcast which someone proposes to present in answer to a previous presentation concerns the particular issue already discussed and provides a contrasting viewpoint on it. Similarly, when responding to complaints or Commission inquiries on fairness matters, licensees should "in listing those presentations on each side of an issue ... include only those programs which are truly germane to that specific issue." 24/ In a footnote to the preceding quotation in the Fairness Report, the Commission noted:

> One station, in responding to a complaint concerning the issue of gasoline and air pollution, provided the Commission with a list of programs which included the following: "The Great Red Apes," "Turtle of the Sulu Sea," "The Night of the Squid," and "Return of the Sea Elephants." While such programming obviously would provide information on a part of the world's environment, it may not be germane to any specific issue concerning gasoline and air pollution.

(d) Timeliness of Contrasting Presentations. The Commission has stated that the goal of the Fairness Doctrine to develop an informed public opinion about vital public issues of the day "could be frustrated if contrasting viewpoints on controversial issues of public importance were not presented in a timely fashion, before the issue involved becomes moot." 25/ However, the Commission continued in the quoted ruling, "in the case of a complex, continuing issue such as the 'energy crisis' it would be inappropriate ... to establish restrictive time limits for the presentation of contrasting viewpoints"--especially the five-day period to which the complainant asserted was the "critical period." The Commission noted in this case that although a talk show host had allegedly urged listeners repeatedly on February 24, 25 and 26, 1975, to contact "six swing-vote Senators urging them to vote to override the expected veto by President Ford of the Senate's amendment to his energy bill," the station had furnished evidence that it had broadcast other views on the energy issue repeatedly. It cited the broadcast of the President's "economic message of January 15; a special series of live reports on January 15 which presented spokesmen supporting the President's position; four Presidential news conferences broadcast between March 6 and June 24; the President's special address on energy of May 27; and 28 news reports broadcast during February. Therefore, the Commission stated, it could not be said that the station failed to afford reasonable opportunity in its overall programming for presentation of contrasting viewpoints. In a somewhat similar case, the complainant alleged that during 1974 a station

21/ Sunbeam TV Corp. (WCKT), 27 FCC 2d 350, 352 (B/c Bur. 1971).

22/ Timothy K. Ford (KIRO-TV), 57 FCC 2d 1208, 1209 (B/c Bur. 1976).

23/ Committee for Fair Broadcasting, 25 FCC 2d 283, 293 (1970).

24/ Fairness Report, 48 FCC 2d 1, 21 (1974).

25/ John T. Harrison (WBZ), 57 FCC 2d 612, 613, (B/c Bur. 1975), review denied, 58 FCC 2d 1389 (1976).

had broadcast many editorial advertisements for a power company which favored construction of new power generating facilities--a controversial issue of public importance--and that during 1974, the licensee had not afforded reasonable opportunity for presentation of opposing views on the issue. The station had carried far more programming opposing the construction in 1975 than in 1974, but the complainant sought to limit the time frame under consideration to the year 1974. This the Commission refused to do since there was no evidence that the issue became moot after 1974. In fact, the complainant's own pleading in January 1976 asserted that as of that date, the controversy was "still extant." The Commission found that the overall programming of the station must be considered on a controversy that had continued for three years, and that on the basis of the evidence, it could not "be said that, in terms of total time, frequency, or potential listening audience, KGHL has failed to afford a reasonable opportunity for presentation of contrasting viewpoints." 26/

(e) Presidential Speeches. Attempts have been made at times to assert an automatic right of reply by a spokesperson of an opposing party to speeches made by a President of the United States. Of course, if the incumbent President also is a legally qualified candidate for renomination or reelection and his appearance is not exempt from the equal opportunity requirements, other legally qualified candidates will be entitled to "equal opportunities" under Section 315(a) of the Act. However, if the President is not such a candidate, the Fairness Doctrine applies to his utterances like those of anyone else, and there is no right of response by any particular person; in fact, if the station or network has in other programs afforded reasonable opportunity for presentation of views in contrast to those expressed by the President, it has no Fairness Doctrine obligation to make time available to anyone to answer his speech. The only time when the Commission found that Presidential speeches had incurred a special fairness obligation involved a highly unusual set of circumstances. Between November 1969 and June 1970, the President made five uninterrupted speeches in prime network time expressing the Administration's viewpoint on the Indochina War issue. Each of the three TV networks had dealt at length with the issue in newscasts, documentaries, interview programs and on-the-spot coverage of news events. The Commission found that all of these other presentations of the issue were roughly balanced, but that reasonable opportunities had not been afforded views opposed to those of the President "when there has been an extensive but roughly balanced presentation on each side and five address the nation on this issue." The FCC stated that in such circumstances "there must also be a reasonable opportunity for the other side geared specifically to the five addresses (i.e., the selection of some suitable spokesman or spokesmen by the networks to broadcast an address giving the contrasting viewpoint)." The Commission emphasized that "we are not holding that such obligation arises from a single speech [or] that where an uninterrupted address is afforded one side, the Fairness Doctrine demands that the other side be presented in the same format.... Rather, our holding here is based upon the unusual facts of this case--five addresses by the outstanding spokesman of one side of an issue.... [W]e require that at the least, time be afforded for one more uninterrupted opportunity by an appropriate spokesman to discuss this issue.... We of course leave entirely to the judgment of the networks the selection of the appropriate spokesmen." 27/

(f) Illustrative Cases of "Reasonable Opportunity." In addition to the cases previously summarized in which the licensee was found to have afforded a reasonable opportunity for response, the following are cited as illustrative of Commission rulings to this effect:

(1) A complainant stated that a station had refused to let him answer an editorial on the Vietnam war moratorium. The station cited specific examples of broadcasts that already had presented many divergent views on the subject. The complainant answered that the station had provided no evidence that divergent views had been presented on the general rationale of the moratorium. The licensee then invited the complainant to come to the station and review the editorial to see if he had any additional contrasting views that had not already been broadcast, and in order for the station to determine whether the complainant was a suitable spokesman "to articulate such additional viewpoints." The complainant declined the invitation. The Commission said that the licensee's overall programming appeared to have fulfilled its obligation "reasonably to present contrasting views on the moratorium issue" and that "To require the licensee to go beyond this requirement and in any event afford time to all who wished to express their views would be inconsistent with the act ... and result in a chaotic situation which would not 'promote the larger and more effective use of radio in the public interest' (Section 303[g])." 28/

(2) A referendum was to be held on a bond issue to finance construction of a high school. The complainant in the case opposed the bond issue. He had asked the station to assist him and his group in presenting the broadcast of an "open dialogue on the bond issue"

26/ Northern Plains Resource Council (KGHL), 52 FCC 2d 644 (B/c Bur. 1975), review denied, 59 FCC 2d 482 (1976), recon. denied, 61 FCC 2d 543 (1976).

27/ Committee for Fair Broadcasting, 25 FCC 2d 283, 297-98 (1970); see, also, Republican National Committee, 40 FCC 625 (1964); Blair Clark, 11 FCC 2d 511 (1968); Democratic National Committee, 31 FCC 2d 708 (1971). For cases involving a Governor rather than a President, see Boalt Hall Students Association, 25 FCC 2d 70 (B/c Bur. 1969); review denied, 20 FCC 2d 612 (1969).

28/ Amedeo Greco (WHAL), 22 FCC 2d 24, 25 (1970); see, also, Boalt Hall Students Association, 25 FCC 2d 70 (B/c Bur. 1969); review denied, 20 FCC 2d 612 (1969).

between his group and the School Board, which favored the bond issue. However, the School Board refused to participate. The station then offered the complainant's group time to present its views. The complainant rejected the offer. The station later presented a program featuring a film showing where the school would be built, statements by School Board members and answers by the Board to questions submitted both by the complainant's group and the public. The station also devoted part of a news program to a summary of the complainant's position. The Bureau found that the licensee had not acted unreasonably or failed on an overall basis to afford reasonable opportunity for the presentation of conflicting views. 29/

(3) One complainant asked the Commission to reexamine the Fairness Doctrine "as applied to the personality newscaster who regularly delivers editorial opinion and news analysis," and to introduce an "equal effect" standard in applying fairness to such situations. The Bureau stated that it was not persuaded to apply a special "equal effect" standard to newscasters and that in this particular case, the station had in its overall programming afforded reasonable opportunity for contrasting views on the issues cited by the complainant. 30/

11. Restrictions Licensee May Not Impose on Response. Although the station licensee has great latitude in choosing the spokesperson to present an opposing view, there are certain limitations of the licensee's discretion in scheduling the response and choosing its format, as illustrated below:

(a) A station may not bar the presentation of a viewpoint contrasting to one already broadcast simply because no one is willing to pay to present the contrasting view. 31/ However, as stated in the Cullman case cited in note 31, a licensee may seek to obtain sponsorship of the presentation of a contrasting view, even though failure to obtain sponsorship does not justify refusal to broadcast the view. In one case, a licensee responded to a fairness complaint by offering to sell the complainant time in which to present its views. The complainant never answered the licensee's letter. The Commission ruled that since under Cullman "the station could appropriately explore the possibility of obtaining paid sponsorship ... it was ... entitled to receive an answer whether or not the [complainant] was interested in purchasing time." 32/

(b) The Commission found in another case that some of the conditions the licensee had laid down in its offer of time for contrasting views would unduly restrict the presentation of the views. Specifically, the licensee offered to accept a response only if it "(i) ... does not contain any defamatory, scandalous or obscene matter or any matter contrary to law or any of the rules and policies of the Federal Communications Commission ("FCC"); (ii) the program will not subject us or any person or group to ridicule or public censure; (iii) the program will not contain any "personal attack" as defined by the FCC; and (iv) the content of said program will be such that we will not be obligated to offer any other person or group time to respond thereto under the Fairness Doctrine of the FCC."
The Commission found the first condition to be proper, but stated that the last three conditions "unduly restricted the presentation of contrasting views." It stated further:

> While we need not decide here the limits of a licensee's power to censor a prepared statement before it is broadcast, it is clear that the effect of the last three conditions was unreasonably to inhibit the presentation of the opposing view. Thus, ridicule is a well-recognized and legitimate form of argument, and a licensee's refusal to carry any matter on the ground that it might be subjected to a public censure would foreclose much unpopular debate. Nor should a partisan spokesman be required to foreswear all personal attacks, no matter how germane or essential to discussion of an issue, or himself to decide in advance what the licensee's judgment will be on whether any particular language is a personal attack. Finally, the avoiding of any matter that will cause the licensee to incur fairness responsibilities is plainly so vague as to have no effect but inhibition. 33/

(c) Still another question of the reasonableness of the opportunity to respond is raised when the licensee offers a spokesperson for a contrasting view a chance to appear on the station only if he or she appears on the same program on which the original viewpoint was presented. The Commission has in several cases found that when the offer is limited to such a program and the person conducting the program controls it and uses it to promote his own partisan views, "the Fairness Doctrine requires something more than presentation of contrasting views limited to joint appearances with him on a program whose content he controls and where, as has been complained in other cases, the licensee will 'always have the last word.'" 34/ However, in one case where the facts were somewhat different, the Commission found no evidence that a network's offer to interview the complainant on the same news program on which the original viewpoint had been expressed was made in bad faith or

29/ Pollard R. Dickson (KWSU-TV), 27 FCC 2d 857 (B/c Bur. 1970).

30/ Norman Zafman (KTTV), 26 FCC 2d 297 (B/c Bur. 1970).

31/ Cullman Broadcasting Co., 40 FCC 576 (1963); Rev. John M. Norris (WGCB), 1 FCC 2d 934, 1587, aff'd sub nom. Red Lion Broadcasting Co., Inc. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), 395 U.S. 367 (1969); see, also, Council for Employment and Economic Energy Use, 65 FCC 2d 26 (1977), aff'd sub nom. Council for Employment and Economic Energy Use v. FCC, 575 F.2d 311 (1st Cir. 1978).

32/ Democratic National Committee, 40 FCC 655 (1965).

33/ Sidney Williams and Russell Willis (KNBC-TV), 33 FCC 2d 304, 307-8 (1972).

34/ WCHP Broadcasting Co., 41 FCC 2d 201, 205 (1973); see, also, Living Should Be Fun, 33 FCC 101, 107 (1962) and WITH Radio, Inc., 53 FCC 2d 428, 436 (1975) (See Note 14, Section C).

that the format would have so restricted the complainant's response as to "constitute an unreasonable opportunity." The FCC stated that had the complainant submitted to the interview by the reporter who had prepared the material about which the complaint was made and "thereafter complained that he was not afforded a reasonable opportunity to respond to the issues contained in the report, the Commission would of course have considered such complaint. However, we cannot find that [complainant's] decision that he would receive less than fair treatment in an interview format was based on any evidence of which the Commission may now take cognizance." 35/ It should also be pointed out that the network had repeatedly invited the complainant and other officials of the union that he headed to appear on the news program in connection with its broadcast of investigative reports about the union and that all had refused. The complainant agreed to be interviewed by the investigative reporter only if he were allowed to preview the film of the interview and to veto its use. The Commission stated that under all of the circumstances of the case it could not find that the network (NBC) failed to afford a reasonable opportunity for the presentation of contrasting views. A distinguishing feature between this case and the three cited in note 34 above is the fact that the program here involved was the NBC Nightly News, which was not under the control of the reporter who was to interview the union official, whereas in the other three cases the programs were under control of the partisan conductors of the programs.

35/ International Brotherhood of Teamsters (NBC), 59 FCC 2d 1317, 1319 (B/c Bur. 1976).

K. WHAT A COMPLAINANT MUST DO

The preceding section of Part III has explained the obligation of the broadcaster to try to present contrasting views on controversial issues of public importance. However, before the Commission will call upon a broadcaster to explain his actions (or lack of them) in connection with an issue, it must receive from a complainant enough information and/or allegations to justify a Commission inquiry. Burdening a broadcaster with the task of proving that he or she presented or tried to present contrasting views on every controversial issue that was ever mentioned on any program might, indeed, have the "chilling effect" on broadcast journalism and public discussion that some critics of the Fairness Doctrine have attributed to it. For example, a great many so-called Fairness Doctrine complaints merely allege that the complainant heard one side of a controversial public issue advocated on one program and demand, solely on this basis, that the writer or someone else be permitted to broadcast a contrasting view on the issue. These are not adequate complaints because the station may have presented contrasting views on other programs, and the Commission will not require a licensee to respond to such a complaint unless the complainant provides reasonable grounds for believing that the station has not presented contrasting views on other programs and has no plans for doing so. As explained in the preceding section of Part III, the broadcaster is not required to present "both sides" of an issue on a single program or even a series of programs, provided that he or she tries to do so in the station's overall programming. Also, as indicated in Section C of Part I of the Primer, the complainant must specify the particular controversial issue of public importance that has been presented and why it is such an issue. These and other essential elements of a fairness complaint are discussed below.

1. Contacting the Station or Network. Before sending a complaint to the Commission, a person who believes the Fairness Doctrine has been violated should first complain (preferably in writing) to the station or network believed to be at fault. The Commission has found in many cases that the station or network will be able to furnish an answer that is satisfactory to the complainant; for example, to demonstrate that in other programs it has presented contrasting views on the issue or that it has definite plans to do so in the future. If the latter to the station or network brings no response within a reasonable length of time, the complainant then should complain to the Commission. If an answer is received from the station or network which is believed unsatisfactory, the complainant should write to the Commission, enclosing copies of his or her letter to the station and the station's response.

2. Definition of the Issue. Section C of this Part of the Primer has dealt at length with the question of what a controversial issue of public importance is and is not, in view of the situation existing at the time a complaint is filed. A potential complainant should study Section C and try to determine whether the broadcast in question included discussion of such an issue. In his or her complaint to the Commission, the complainant must define the issue specifically, state why it was controversial and of public importance, identify the specific programs on which each issue was discussed and state the particular views or sides of the issue that were presented. In one typical case, the complainant merely alleged that a licensee had unfairly presented the issues of "world population, resource, food, water, space, and birth-rate situations." The Bureau rejected the complaint and said that "Without more detailed information regarding the particular issues and views broadcast by the stations and the specific grounds for belief that only one side of any controversial issue or issues of public importance has been presented in the station's overall programming, the Commission cannot properly review any allegation of the licensee's failure to comply with the Fairness

1/ Robert L. Sassone (WBC-TV, KPBC-TV), 37 FCC 2d 1017, 1018 (B/c Bur. 1972).

Doctrine." 1/ Another complainant made a vague allegation of unfairness in the presentation of such issues as home rule, public schools, crime and police brutality. 2/ The Commission stated:

> Absent detailed and specific evidence of failure to comply with the requirements of the Fairness Doctrine, it would be unreasonable to require licensees specifically to disprove allegations such as those made here. The Commission's policy of encouraging robust, wide-open debate on issues of public importance would in practice be defeated if, on the basis of vague and general charges of unfairness, we should impose upon licensees the burden of proving the contrary by producing recordings or transcripts of all news programs, editorials, commentaries and discussion of public issues, many of which are treated over long periods of time....

2/ Allen C. Phelps (WTOP-AM-TV), 21 FCC 2d 12, 13 (1969). For a more recent case involving failure to define precisely the specific controversial issue presented, see American Security Council Education Foundation Against CBS, Inc., 63 FCC 2d 366 (1977), aff'd 607 F.2d 438 (D.C. Cir. 1979).

3. Overall Programming of Station. Since a station need not present contrasting views on an issue in the same program or series of programs, or even in the same program format, a fairness complainant must give reasons for believing that the station has not in its overall programming presented, or afforded opportunity for presentation of, views in contrast to those it is known to have broadcast. As the District of Columbia Circuit Court of Appeals stated in one case, 3/

> On a complaint under the Fairness Doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensees devoted to this particular issue. It is not enough for the complainant to allege there is a controversial issue of public importance on which the complainant wants to be heard.... The essential element in invoking the Fairness Doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore, and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance.

3/ Healey v. FCC, 460 F.2d 917, 921 (D.C. Cir. 1972); see, also, John F. Jackson (WKAC-TV), 24 FCC 2d 732 (B/c Bur. 1970); Leymond Robinson (WPIX), 32 FCC 2d 299 (B/c Bur. 1971); Ms. Randy Engel, 39 FCC 2d 30 (B/c Bur. 1973).

The requirement that a complainant state his reasons for concluding that in its other programming the station has not presented contrasting views on the issue does not mean that the complainant must constantly monitor the station. As the Commission stated in its Fairness Report on pp. 19 and 20:

> ... Although some groups having a particular interest in a controversial issue and a licensee's presentation of it have monitored such a station for periods of time and thus been able to offer conclusive evidence that contrasting views were not presented, the Commission realizes that such a requirement for every individual complainant would be an unduly burdensome one. While the complainant must state the basis for this claim that the station has not presented contrasting views, that claim might be based on an assertion that the complainant is a regular listener or viewer; that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the station involved. This does not require that the complainant listen to or view the station 24 hours a day, seven days a week. One example of a "regular" television viewer would be a person who routinely (but not necessarily every day) watches the evening news and a significant portion of the public affairs programs of a given station. In the case of radio, a regular listener would include a person who, as a matter of routine, listens to major representative segments of the station's news and public affairs programming. Also, the assumption that a station has failed to present an opposing viewpoint would be strengthened if several regular viewers or listeners join together in a statement that they have not heard a presentation of that viewpoint. Complainants should specify the nature and extent of their viewing or listening habits, and should indicate the period of time during which they have been regular members of the station's audience. We do not believe this requirement to be unduly burdensome, as contrasted to the heavy burden we would place on all stations if we required them to provide evidence of compliance with the Fairness Doctrine based on complaints which assert merely that one program has presented only one side of an issue.
>
> The fact that regular viewers or listeners have not been exposed to an opposing viewpoint is obviously not conclusive evidence that the viewpoint has not been presented, but it does indicate that there is a reasonable basis for the viewer's conclusion that such is the case. See Allen C. Phelps, 21 FCC 2d 12 (1969). Accordingly, we believe that it is a sufficient basis for a Commission inquiry to the station. [Fairness Report at 20.]

4. Summary of Procedural Steps. To summarize, from the preceding decisions the Commission has evolved the following procedural steps it expects a complainant to follow in establishing the prima facie case necessary to warrant Commission inquiry of the station. The complainant should submit specific information including:

(1) the broadcaster (station or network) involved;

(2) the specific issue of a controversial nature broadcast (complainant should include an accurate summary of the views broadcast);

(3) the date and time when the issue was broadcast;

(4) the basis for the claim that the issue was controversial and of public importance;

(5) reasonable grounds for the claim that the station or network broadcast only one side of the issue in its overall programming. Such claim might be based on an assertion that the complainant is a regular listener or viewer -- that is, a person who consistently or as a matter of routine listens to the news, public affairs and other non-entertainment programs carried by the broadcaster involved. This does not require that the complainant listen to or view the station 24 hours a day, seven days a week; however, the complainant should describe his or her listening or viewing habits.

(6) copies of correspondence between the complainant and the broadcaster; and

(7) whether the broadcaster has afforded, or has expressed an intention to afford, reasonable opportunity for the presentation of contrasting viewpoints on that issue. Fairness Report, at 19.

5. Station's Response to Commission Inquiry. In a continuation of the passage quoted above, the Commission explained the kind of response a station is expected to provide when it receives a fairness inquiry from the Commission:

> In responding to such an inquiry, a station is not required to research everything it has broadcast on the subject over a considerable period of time, unless it believes it is necessary to do so in order to establish its compliance with the Fairness Doctrine with respect to the issue involved. The complaint must specify the date and time of the particular program or programs which presented one side of the issue. If the complaint specifies only a single program, it would be sufficient for the licensee to furnish evidence of having broadcast another program which did afford a reasonable opportunity for contrasting viewpoints an opportunity to be heard which is reasonable when considered in relation to the specific programs complained of. In this regard, it should be kept in mind that the Fairness Doctrine does not require exact equality in the time provided for contrasting points of view, but only that a reasonable opportunity be afforded for their presentation. [Fairness Report at 20.]

The Commission appended the following footnote to the above-quoted paragraph of the Fairness Report:

> The procedure which we are outlining here is the one which we will follow in the ordinary case. It is possible, however, that in some circumstances the Commission may find it necessary to inquire into a station's total programming effort on an issue or at least a significant portion of that programming. Also, in cases where a message on one side of an issue has obviously been repeated many times (as in "editorial" advertising campaign), the complainant could not be expected to provide a list showing the time and date of each presentation. This information would have to be provided by the licensee in his response to a Commission inquiry. [Id.]

6. Delay in Filing Complaint. Although the Commission has set no deadline for the filing of fairness complaints--and, indeed, the complainant's efforts to obtain satisfaction by dealing directly with the station may sometimes take a considerable amount of time--the Commission finds it much more difficult to deal with complaints filed long after the broadcasts in question than those filed as soon as possible. In one case where there was a delay of a year or more, 4/ the Bureau stated:

> The Commission expects a complaint to be brought within a reasonable time after the complainant becomes aware of the incident in question, so that the licensee and the Commission may take necessary action in a timely manner. The four editorials in question were broadcast on dates ranging from May 12, 1972 to September 21, 1972, and you did not file your complaint about these broadcasts until September 19, 1973. We of course must take cognizance of this ... in terms of the difficulties involved, particularly with respect to memories of the parties of relevant incidents ....

4/ Dr. James H. Toole (WKRG-AM-FM-TV), 45 FCC 2d 837, 840 (B/c Bur. 1974).

F. PERSONAL ATTACKS

The personal attack rule is based on the Fairness Doctrine. The rule does not prohibit the broadcast of personal attacks. Instead, it requires broadcasters who air attacks to notify the persons attacked and to offer them reasonable opportunities to respond. The text of the rule is as follows:

Section 73.1930 Personal Attacks.

(a) When during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked:

(1) Notification of the date, time and identification of the broadcast;

(2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and

(3) An offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this Section shall not apply to broadcast material which falls within one or more of the following categories:

(1) Personal attacks on foreign groups or foreign public figures;

(2) Personal attacks occurring during uses by legally qualified candidates;

(3) Personal attacks made during broadcasts not included in paragraph (b)(2) of this section and made by legally qualified candidates, their authorized spokespersons, or those associated with them in the campaign, on other such candidates, their authorized spokespersons or persons associated with the candidates in the campaign; and

(4) Bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events, including commentary or analysis contained in the foregoing programs.

(c) The provisions of paragraph (a) of this section shall be applicable to editorials of the licensee, except in the case of noncommercial educational stations since they are precluded from editorializing (section 399(a), Communications Act). 1/

Not every criticism of, or even "attack" upon, a person is a "personal attack" for the purposes of the rule. It must be an attack upon the "honesty, character, integrity or like personal qualities" of an identified person or group. Criticizing a person's intelligence, education or ability, for example, is not a personal attack under the rule, no matter how caustic or insulting the criticism may be. Note, also, that the rule applies only to personal attacks made during the discussion of a controversial issue of public importance. 2/ For guidelines in deciding whether an issue fits into this category, see Section C of this Part of the Primer. What aspects of the rule will be discussed at length in the following paragraphs.

What Is a Personal Attack?

1. Calling a person a liar, a coward, a thief or a traitor to his country or accusing him of fraud or political corruption obviously is a personal attack for purposes of the rule if the attack is made during discussion of a controversial issue of public importance and if the victim of the attack is identified. Some examples of broadcasts that have been found to constitute personal attacks follow:

(a) "He is Willing to Pander With Falsehoods." One broadcast included the charge that an identified person "is either inefficient, in that he doesn't know how to get correct information, or he is willing to pander with falsehoods...." The Commission ruled that "Such statements bear directly on his integrity and character and fall within the purview of the Commission's personal attack rule." 3/ (The allegation that the person was inefficient would not, in itself, have been a personal attack because it did not reflect upon his character.)

(b) Arson, Threats on Life. During a documentary, a station quoted tenants of a slum hotel as accusing the hotel owner of setting fires to it in order to drive them out. The owner also was accused of "ruthlessly driving out from their homes individuals 70 or 80 years old," and the program implied that he might have been responsible for threatening the life of a priest who was trying to organize the tenants. The Commission found these statements to constitute personal attacks. 4/

(c) Calling a Person or Group Communist; "Truth No Defense." The Commission has held repeatedly that identifying a person or group as Communist falls within the scope of the personal attack rule. 5/ The claim that the charge is true or that it is based upon official government documents does not remove it from the personal attack category. The Commission has stated:

1/ The corresponding rule for origination cablecasts is in Section 76.209(b) and (c).

2/ Although a personal attack does not fall within the scope of the rule unless it is made during the discussion of a controversial public issue, it may violate the broadcaster's public interest obligation if it represents use of the station to serve his private interest. See Personal Attacks; Political Editorials, 9 FCC 2d 721, 725 (1967); also, footnote 1, Section C above.

3/ KSLY Broadcasting Co., 43 FCC 2d 875, 877 (1973), recon. denied, 48 FCC 2d 612 (1974).

4/ Educational Broadcasting Corporation (WNET), 65 FCC 2d 152, 156 (1977).

5/ Storer Broadcasting Co., 11 FCC 2d 678 (1968); WIVK Radio, Inc., 31 FCC 2d 87 (1971) (See Note 14, Section C, above); Rhode Island Broadcasting Co. (WRIB), 49 FCC 2d 682 (B/c Bur. 1974).

> As we have stressed in other similar areas, the truth or falsity of the attack is not a matter for determination by the Commission. The short answer is that in those circumstances the licensee cannot aver that the attack is true and therefore there is no need to let the public hear the other side; that rather the other side must be given an opportunity to reach the public.... 6/

6/ Rhode Island Broadcasting Co., above, at p. 684, quoting Storer, above, at p. 679; see, also, Lew W. Cherry (WOIO), 25 FCC 2d 887 (B/c Bur. 1970).

The Commission also has ruled that a broadcast accusing a college professor of promoting "the Russian form of government ... under which millions were butchered" and of "trying to destroy the American form of government" was a personal attack. 7/ Stating that the local school superintendent "does not pledge allegiance to the flag" also was a personal attack, since it "constituted an attack upon his character and integrity, particularly in light of [his] position in the community." 8/

7/ Evening News Association (WWJ), Notice of Apparent Liability, FCC 72-133.

8/ Floyd Jeter (KFLJ), 44 FCC 2d 26 (B/c Bur. 1973).

(d) Attack on John Birch Society. After describing the John Birch Society as "the most active and powerful of [the 'radical right'] groups," a program stated that the "radical right" often engages in "physical abuse and violence," disrupts "other people's meetings" and engages in "local terror campaigns against opposition figures." It also alleged that the Society used a "front name" in campaigning to remove a certain book from a library. The Commission found that "these statements, taken together, do constitute a personal attack upon the integrity, honesty, and character of the Birch Society." 9/

(e) Person Accused of Making "False Charge." The following was broadcast about one Fred Cook:

> Now who is Cook: Cook was fired from the New York World-Telegram after he made a false charge publicly on television against an unnamed official of the New York City government. New York publishers and Newsweek magazine for December 7, 1959, showed that Fred Cook and his pal Eugene Gleason had made up the whole story and this confession was made to District Attorney Frank Hogan.

The Commission found this to be a personal attack. 10/

9/ Roy Barthold (KURT), 11 FCC 2d 790, 791 (1968).

10/ Rev. John M. Norris (WGCB), 1 FCC 2d 934 (1965), recon. denied, 1 FCC 2d 1587 (1965), aff'd sub nom. Red Lion Broadcasting Co., Inc. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), 395 U.S. 367 (1969).

(f) "Stealing, Robbery, Theft, Trickery, Deceit." During a series of editorials on debt-adjusting businesses in the area, a licensee used such terms as "stealing," "robbery," "theft," "trickery," and "deceit." The Commission found that this language involved an attack upon the honesty, character and integrity of those engaged in this business in the area during discussion of a controversial issue of public importance--that is, alleged abuses in the debt-adjusting field and appropriate remedial legislation. 11/

11/ Radio Denver, Inc. (KTLN), 40 FCC 658 (1965).

(g) "Deliberate Lies ... Distortions ... Paranoic Distresses." During discussion of a pending referendum, a station broadcast statements charging that one person involved in the issue had resorted to a "deliberate lie" and "distortions and some downright lies" during the pre-referendum campaign and that another had been working under "paranoic distresses" during that time. The Commission ruled that these statements "were direct, specific allegations of lying and mental instability which did attack the 'honesty, character, integrity or like personal quality' of these men within the meaning of ... the Rules." 12/

(h) "Exploiters ... Who Cheated ... Families out of Their Homes." The Commission cited as a personal attack the following passage:

> The exploiters were, and are, certain Baltimore real estate speculators whose tactics of racial fear cheated nervous white families out of their homes and then exploited the black families who moved in by charging them high rents or selling them homes at prices way above fair market values.

The FCC stated that the complaining real estate company "was identified and referred to as a prime example of a Baltimore real estate speculator." 13/

12/ Lincoln Smith and Earl J. Ormsby (WCMR), 26 FCC 2d 354, 355 (1970).

13/ M. Goldseker Real Estate Co. (WJZ-TV), 32 FCC 2d 28, 29 (1971), aff'd sub nom. M. Goldseker Real Estate Co. v. FCC, 456 F.2d 919 (4th Cir. 1972).

(i) Attack Need Not be Made by Licensee. The fact that the licensee of a station does not make the attack does not remove the broadcast from the personal attack category. Licensees are expected to be fully aware of their programming and are responsible for complying with the personal attack rule, the Fairness Doctrine, etc., in connection with material broadcast by others over their stations. 14/

14/ National Association of Broadcasters, 40 FCC 579 (1963); see, also, Dr. John Cabler (WKAL), 40 FCC 2d 579, 581 (B/c Bur. 1973).

What Is Not an Attack Under the Rule?

Even if a broadcast attacks the "honesty, character, integrity or like personal qualities" of a person or group, there are other factors which may prevent its being a personal attack for purposes of the rule, as detailed below.

2. Is There a Controversial Issue of Public Importance? The rule applies only to attacks made "during the presentation of views on a controversial issue of public importance." For an extended discussion of what such an issue is and is not, see Section C of this part of the Primer. Some complainants have mistakenly believed that the criticism of them, in itself, creates the necessary controversial issue of public importance. However, the Commission made it clear in adopting the rule that this is not so. It stated:

> Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance.... This misconceives the principle, based on the rights of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public-interest issues, but such issues are not the focus of the Fairness Doctrine. 15/

15/ Personal Attacks; Political Editorials, 8 FCC 2d 721, 725 (1967).

During a telephone call-in program, the station's moderator explained that he would cut off a certain identified person if that person called because he was a "liar" and a "hatemonger." The Bureau upheld the licensee's judgment that these remarks were not made during discussion of a controversial issue of public importance. It said, "While the matter was not purely private, since [the complainant] had frequently spoken on the station and the conversation referred to use of the station, it also seems to us on the facts before us that this kind of dialogue was one in which the public at large had little interest, and that it did not rise to the level of a debate or discussion on any significant public issue." 16/

16/ Lew W. Cherry (WOIO), 25 FCC 2d 887, 888 (B/c Bur. 1970). See also Thaddeus L. Kowalski, 42 FCC 2d 1110 (1973); review denied, 46 FCC 2d 124 (1974), aff'd sub nom. Polish American Congress v. FCC, 520 F. 2d 1248 (7th Cir. 1975).

3. Is the Attacked Person or Group Identified? A complainant asserted that a station violated the personal attack rule by referring to the "phony patriotism" of opponents of the Panama Canal treaties. The Bureau in a ruling later affirmed by the Commission stated that an attack must be made on an identified person or group and that the complaint had not established that the editorial in question was understood by the general public to be directed towards a specific group or person. 17/ During a telephone call-in program it was alleged that a "Mr. Bell" had required a job-seeker to pay him $200 to obtain a political position. The county assemblyman was named H. Clark Bell and he immediately requested a tape recording of the broadcast. The station licensee replied that its tape recorder had malfunctioned during the broadcast and no tape was available, but immediately had the moderator of the program make a deposition giving the substance of the remarks. Copies of the deposition were sent within seven days of the broadcast to the complainant and to all other persons named Bell who were listed in the telephone book. All were offered an opportunity to respond to the remarks. The Bureau ruled that the licensee was within reason in determining that "there was no real identification of the Mr. Bell referred to on the program so as to bring it within the purview of the Commission's rules." It also noted that the station had, within seven days of the broadcast, offered the complainant an opportunity to respond to the broadcast and furnished him with an affidavit summarizing it. 18/

17/ Horace Rowley III, 69 FCC 2d 1047 (B/c Bur. 1978), review denied, FCC 78-753; see, also, Hotels Advertising Co., 51 FCC 2d 73 (B/c Bur. 1975); Diocese of Rockville Center, 50 FCC 2d 330 (B/c Bur. 1974).

18/ Hon. H. Clark Bell (WKNY), 23 FCC 2d 38, 39 (B/c Bur. 1970).

4. Rule Does Not Apply to Attacks During Exempted Programs. As the rule states, it does not apply to: (i) attacks on foreign groups or foreign public figures; (ii) attacks on anyone which occur during "uses" of stations by political candidates; (iii) attacks made by political candidates or their spokespersons or associates on other candidates or their spokespersons or associates; and (iv) attacks made in bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events, including commentary or analysis contained within such news programs. The rule does apply to station editorials and to documentaries.

5. General Fairness Doctrine Applies to Attacks in News Programs. When it amended the personal attack rule to add exemptions for attacks made during news interviews and news commentary contained within news programs, the Commission made it clear that attacks on news-type programs still might incur general Fairness Doctrine obligations. The Commission stated:

> ... the Fairness Doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints.... The licensee has considerable discretion in choosing ways to discharge that affirmative duty.... In the case of the personal attack there is not that same latitude. Under our revision with respect to exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is

satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it is obviously not appropriate for the licensee to make general offers of time for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman to present the other side of the attack issue--the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond. 19/

6. Cases Where Derogatory Remarks Were Ruled Not to be Personal Attacks. Following are some examples of cases in which the Commission found that unfavorable remarks were not personal attacks because they did not impugn the "honesty, character, integrity or like personal qualities" of the complainant:

(a) "Self-Appointed Guardian ..." In connection with an automobile accident in which the complainant was involved, a station announcer referred to her as "Mrs. Moore, self-appointed guardian of Red Lodge's sidewalk decorum" and stated that "several Red Lodge residents have expressed the sentiment that it couldn't have happened to a more deserving person." 20/

(b) Judges Imposed Sentences That Violated State Law. In a series of broadcasts critical of the local judiciary, a station alleged that certain identified judges had imposed sentences that apparently violated state law. The Commission refused to overrule the licensee's judgment that no personal attacks had taken place. It said, "There was obviously strong disagreement with the judges' actions, but no more. There is an important distinction ... between contending that a judge has exceeded his discretion in a legal sense or that he has erred in deciding a case, and charging that he has decided a case because of improper or corrupt motives." 21/

(c) "Political Opportunist." The licensee referred to the complainant as "a political opportunist." The Commission upheld the judgment of the licensee that this was not a personal attack. 22/

(d) "Garrulous Grand Dame." No personal attack was found when a broadcast referred to the complainant as "the garrulous grand dame of Billings talk shows" and "pistol-packing momma." 23/

(e) "Confirmed Nuisance ... Obnoxious." Characterizing the complainant as a "confirmed nuisance" and "obnoxious" did not impugn her honesty, character or integrity and therefore was not a personal attack. 24/

(f) Doctors and Nurses Called Incompetent. Referring to some of the doctors and nurses on a hospital staff as "incompetent" was ruled not to be a personal attack. The Commission stated:

> An incompetent person is defined in Webster's dictionary as a person "without adequate ability or knowledge...." Honesty, character, integrity and other like qualities applicable to the personal attack rule are characteristics which relate to the personal credibility or moral turpitude of an individual and not to the particular individual's ability or knowledge. Accordingly, it does not appear that the use of the word incompetent constitutes a personal attack, as defined by the Commission's Rules. 25/

However, in another case involving the same radio station and a doctor at the same hospital, the Bureau found that a personal attack had been made when the doctor was accused of "unethical conduct" in the death of two small children and of being "convicted and found guilty in the death of a young boy." 26/

(g) The Port of New York Authority alleged that a personal attack had been made against it in a series of programs alleging that its marine terminal programs represented broken promises to the city, that the Port Authority was more interested in money than in people and that:

> Critics claim that Commissioners usually act as a rubber stamp for Tobin and his staff. The Authority holds no public hearings. Commissioners gather once a month at Port Authority headquarters to formally approve decisions.... Actually, most policy matters are ironed out in private, at the Wall Street Club, a penthouse restaurant where Commissioners and key aides meet frequently. It is this closed door policy which has generated much of the controversy swirling around the Authority.... It's for this reason that we feel so strongly that the Port Authority has not performed its function, the function for which it was created, which was to develop the port as a whole, and not merely in a way that was most profitable to them.

19/ Amendment of Personal Attack Rules, 12 FCC 2d 250, 252-53 (1968); see, also, M. Goldseker Real Estate Co. (WJZ-TV), 32 FCC 2d 28 (1971), aff'd, 456 F.2d 919 (4th Cir. 1972); Quachee Lakes Corp. (WNAC-TV), 38 FCC 2d 1039. (B/c Bur. 1973).

20/ Mrs. Rita Moore (KRBM), 41 FCC 2d 458, 459 (B/c Bur. 1973).

21/ Sidney Willens and Russell Millin (KMBC-TV), 33 FCC 2d 304, 306 (1972).

22/ John Cervase (WHET-TV), 42 FCC 2d 613 (B/c Bur. 1973), recon. denied, 42 FCC 2d 1104 (1973), review denied, FCC 73-1255.

23/ Mrs. Frank Diesz (KOOK-TV), 27 FCC 2d 859 (B/c Bur. 1971).

24/ Hon. Doris Bunte (WNAC-TV), 42 FCC 2d 1113 (B/c Bur. 1973).

25/ Herbert L. Skogland, M.D. (WKAL), 40 FCC 2d 452, 453 (B/c Bur. 1973)

26/ Dr. John Gabler (WKAL), 40 FCC 2d 579 (B/c Bur. 1973).

The FCC found that the above did not contain an attack upon the "honesty, character, integrity or like personal qualities" of the Authority or any of its members. It stated, "We have made clear before that strong disagreement, even vehemently expressed, does not constitute a personal attack, in the absence of an attack upon character or integrity." 27/

(h) "Blackmail by a Power-Hungry Few ..." During a strike of Philadelphia teachers, the mayor broadcast the following remarks:

> "The public-be-damned attitude by the leaders of the Philadelphia Federation of Teachers must be accepted for what it is--an act of blackmail by a power-hungry few against all the people of our city .... The leaders of the [union] have placed a gun to the heads of our taxpayers, and threaten to pull the trigger unless we surrender unconditionally to their greed.... But I shall not be a party to sham proceedings that seek to extract blood-money from our overburdened taxpayers with the educational welfare of our children as pawns."

The Bureau did not find unreasonable the licensee's judgment that this language did not constitute a personal attack. It said the mayor "may have been using hyperbole to express his opposition and characterized the position of the Federation, but there is no indication that he was in fact accusing the Federation members or leadership of these crimes." 28/

Questions Raised by Timing of Attacks Within Broadcasts

7. Three-part Program. Three parts of a taped speech were broadcast on successive days. During the first broadcast, the speaker charged "the college professors of this country" with "treason" and stated that the remainder of his speech would be devoted to "proving this very, very serious charge." No names were mentioned during the first broadcast, but during each of the next two broadcasts one of the two complaining professors was identified as among the professors to whom the speaker had been referring in the first broadcast. The Bureau stated:

> Under these circumstances, it is apparent that the charge of treason was made against specifically named individuals during the discussion of a controversial issue of public importance. This is so even though the charge of treason and the naming of the professors took place in three different portions of the speech, since the three portions are so closely related as to constitute a continuing discussion of the same issue. 29/

8. Attack Made Two Hours After Discussion of Controversial Issue On Same Program. In another novel case, the moderator of an "open-mike" program invited a Congressman who was active in a nationwide meat boycott to appear on the program for an interview on the subject. The moderator discussed the boycott at approximately 10:45 a.m. on the program, stated that the Congressman had declined to appear, and suggested that the Congressman might be afraid to be interviewed. About two hours later, during discussion of another subject on the same program, the moderator said the Congressman was a "coward." Although the subject being discussed at this time was not a controversial public issue, the Commission ruled that the reference to the Congressman at 12:45 p.m. as a coward "was clearly in reference to his refusal to appear to discuss the [controversial issue of the meat] boycott.... Thus, in the context of the events of this case, it appears that the attack was related to and occurred within the context of the meat boycott." On this basis, the Commission admonished the licensee for not having complied with the requirements of the personal attack rule. Upon appeal, the Court of Appeals remanded the case "for further proceedings not inconsistent with this opinion." The court stated that the Commission had erred in making its own judgment that a personal attack had occurred during the discussion of a controversial issue of public importance "instead of judging the objective reasonableness of the licensee's determination." The court also questioned whether, in light of the "novel aspects" of the case, the station's action could have been found to be unreasonable or in bad faith. The court distinguished this case from Southern California Broadcasting Co., discussed in par. 7 above, because "In marked contrast to the instant case ... the [Southern California] broadcast made abundantly clear that the second day's comments were a continuation of the first day's." 30/ The Commission eventually dismissed the complaint and terminated the proceeding in the remanded "coward" case. 31/

Notification of Person Attacked

9. The rule sets out specific steps the licensee of a station must take if a personal attack is broadcast. The Commission insists on full compliance with this requirement. For example, notification of the attack, offer of time in which to respond, etc., must be given even if it is believed that the victim of the attack already knows about it. 32/ One station broadcast a personal attack upon members of an organization titled Sex Information and Education Council of the United States (SIECUS). The licensee merely mailed notification of the attack to "SIECUS, Washington D.C." without trying to learn the organization's correct address, which was in New York

27/ Port of New York Authority (WNBC-TV), 25 FCC 2d 417, 418 (1970).

28/ Philadelphia Federation of Teachers (KYW-TV), 48 FCC 2d 507, 508 (B/c Bur. 1974), rev'd denied, Nov. 27, 1974, FCC 74-1272.

29/ Southern California Broadcasting Co. (KIEV), 42 FCC 2d 1106, 1108-9 (B/c Bur. 1973).

30/ Strauss Communications, Inc. (WHCA), 44 FCC 2d 952, 957 (1974), 51 FCC 2d 385 (1975), rev'd. sub nom. Strauss Communications, Inc. v. FCC, 530 F.2d 1001 (D.C. Cir. 1976). The Commission's determination that "coward" constituted an attack on a person's honesty, character, or integrity was upheld by the court, 530 F.2d at 1009.

31/ Strauss Communications, Inc. (WHCA), 61 FCC 2d 460 (1976).

32/ Joe Faulk (WTAW), 28 FCC 2d 639 (B/c Bur. 1971).

City. The Commission ruled this a failure to comply with the notification requirement of the rule. 33/ In another case, the Commission ruled that it is not enough merely to inform the person attacked that a controversial broadcast will be or has been made, even though the notice includes an offer of time and an offer to supply a tape recording of the broadcast. The licensee must inform the person attacked that a personal attack has been made on him and enclose a tape or transcript of the broadcast. 34/ In still another case, a station broadcast editorials that contained personal attacks against some CATV operators. The licensee sent copies of the editorials to the CATV operators but made no specific offer of time for them to respond to the attacks. The Commission found that failure to offer the station's facilities for a response was a violation of the personal attack policy (which later was embodied in the present rule). 35/

10. Notification When Attack is on Network Program. Although each station licensee is responsible for everything it broadcasts and therefore is ultimately responsible for compliance with the personal attack rule, the Commission has always accepted network compliance with Fairness Doctrine and "equal opportunities" requirements, and "if the network provides appropriate notice and opportunity for response and the licensee carried such response, its obligation would be satisfied." 36/

What is a "Reasonable Opportunity to Respond?"

11. Station May Not Require Purchase of Time. As is true with the Fairness Doctrine generally, a station may not limit the right to respond to a personal attack to those who are willing to pay for it. The station is free to inquire whether the attacked person or group is willing to buy time for the response, or to seek to obtain another sponsor for the response, but it cannot bar the response merely because sponsorship cannot be obtained. 37/

12. Relationship Between Attack and Response. The station may require the response to be reasonably related to the attack. For example, the Commission found a licensee justified in refusing to accept as a response to an attack on the John Birch Society an hour's program which consisted in part of a film about the founder and president of the society and apparently did not deal with the specifics of the attack. The FCC said that "while the person attacked should be afforded considerable latitude for his reply, the licensee can properly insist upon a reply reasonably related to the attack ...." 38/

13. Length and Placement of Response. In adopting the rules on personal attacks and political editorials, the Commission stated:

> The phrase "reasonable opportunity" to respond is used here ... because such an opportunity may vary with the circumstances. In many instances, a comparable opportunity in time and scheduling will be clearly appropriate; in others, such as where endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may involve more than a few seconds if there is to be a meaningful response. 39/

The same principle would apply to personal attacks as to political editorials. For example, it is obvious that if, during the discussion of a controversial issue of public importance, a speaker said that "John Smith is an embezzler," Smith would not receive "reasonable opportunity" to respond if he were allocated merely the one or two seconds that were required to make the specific accusation against him. 40/

14. When Person Appears on Program in Which He Was Attacked. Two persons allegedly were asked during a broadcast if they ever had been in a mental hospital and if they were or ever had been drug addicts. Both persons appeared on the same program during and for approximately ten minutes after the alleged personal attack was broadcast. The Bureau stated that "under these circumstances, it would appear that they could have responded to the remarks at that time.... In such a situation, it cannot be concluded that the licensee violated the personal attack rule." 41/ However, the Commission reached a different conclusion in another case where the victim of the attack appeared on the same program, because in that case his "appearances was taped prior to the ... broadcast, and he does not appear to have been notified of the nature of the charges against him [before or after the broadcast].... Moreover, his remarks were edited by WMET extensively and consisted of only responses to specific questions asked by the moderator." 42/

15. Station Need Not Broadcast Apology. A station offered the object of an alleged personal attack the same number of 60-second responses that had been allocated to the broadcast of the 60-second editorial in which the attack allegedly had been made. The complainant demanded "a repeated broadcast apology equal to the number of times you broadcast this vilification ...." The Bureau stated that it could not conclude that the licensee had failed to comply with the Fairness Doctrine or the rules. 43/

Limitations the Licensee May Place on the Response

33/ WITN Radio, Inc., 53 FCC 2d 428 (1975) (See Note 11, Section C, above.)

34/ Trans America Broadcasting Corp. (KTYM), 8 FCC 2d 349 (1967).

35/ Springfield Television Broadcasting Corporation (WRLP-TV), 40 FCC 636 (1965).

36/ Senator Eugene J. McCarthy, 11 FCC 2d 511, 515 n. 2 (1968), aff'd Eugene McCarthy v. FCC, 390 F.2d 471 (D.C. Cir. 1968); Personal Attacks; Political Editorials, 8 FCC 2d 721, 724 (1967).

37/ Rev. John M. Morris (WGCB), 1 FCC 2d 934 (1965), recon. denied 1 FCC 2d 1587 (1965), aff'd sub nom. Red Lion Broadcasting Co. v. FCC, 381 F.2d 908 (D.C. Cir. 1967), 395 U.S. 367 (1969).

38/ Roy Barthold (KUHT), 11 FCC 2d 790, 792 (1968); see, also, Storer Broadcasting Co., 11 FCC 2d 678, 680 (1968).

39/ Personal Attacks; Political Editorials, 8 FCC 2d 721, 727 (1967).

40/ Fairness Report, p. 17. For analogous cases involving time allocated for responses to political editorials, see Dolph Pettey Broadcasting Co. (KUDB), 30 FCC 2d 675 (1971) and William J. Dodd (KATC-TV), 32 FCC 2d 545 (B/c Bur. 1971).

41/ Dr. Gene Inch (WHBC), 46 FCC 2d 501, 502 (B/c Bur. 1974).

42/ Educational Broadcasting Corporation (WMET), 65 FCC 2d 152, 157 (1977).

43/ Dean C. Steele (WFIL-AM-TV), 18 FCC 2d 661 (B/c Bur. 1969).

44/ Personal Attacks; Political Editorials, 8 FCC 2d 721, 727 (1967).

As stated in par. 12 above, the licensee may require that the response to a personal attack be "reasonably related" to the attack. Also, when an attack is made upon a legally qualified candidate for public office, the licensee may insist that a spokesperson for the candidate appear rather than the candidate himself, since appearance by the candidate would entitle all other candidates for that office to "equal time" under Section 315 of the Communications Act. 44/ However, there are other limitations on responses that the Commission have found contrary to the purpose of the personal attack rule.

16. Offer of Appearance on Round Table or Panel Discussion. After broadcasting a personal attack on an organization, the station offered to present a spokesperson for the group on a program that included an opposing participant and a moderator. The Commission stated:

> ... while licensees have wide discretion ... in generally meeting the requirements of the Fairness Doctrine ... the matter stands on a different footing with respect to the response to a personal attack. In that situation, the licensee cannot properly insist upon a round table or panel discussion. The person attacked may face a considerable burden, were he to have to participate in a number of such panels in an attack situation .... More important, he might reasonably conclude that a panel or round table discussion does not afford a comparable opportunity to reply, in view of their different structure ... from the program [in which the attack was made]. 45/

45/ Roy Barthold (KUHT), 11 FCC 2d 790, 791-92 (1968).

46/ Radio Albany, Inc.(WALG), 40 FCC 632 (1965).

17. Restricting Response to Station's Own Announcer. A station broadcast a number of editorials criticizing the awarding of the Nobel Peace Prize to Dr. Martin Luther King. The editorials contained personal attacks on Dr. King. The station licensee refused to allow a response to be broadcast by a spokesperson authorized to speak for Dr. King and stated that a station announcer would be used to read the response statement, although it did not claim that the proposed spokesperson was an inappropriate one and, in fact, had permitted him to broadcast replies to other editorials of the licensee. The Commission stated that the spokesperson of the person attacked should be accepted by the station unless he or she is reasonably found by the station to be inappropriate. 46/

18. Repeating Original Attack When Response Broadcast. The Commission has stated that:

> ... prefacing or concluding a reply with a repeat of the original attack would not meet the licensee's original obligations ... of providing the party attacked with a reasonable opportunity to reply, which is the purpose of [the rule]. Thus, if the attacked party knew that if he accepted a station's offer of reply time he would subject himself to attack again at the time of such reply, it would discourage the attacked party from defending himself and thereby help to frustrate our goal of encouraging robust debate. 47/

47/ Stations WGCB and WKUR, 41 FCC 2d 340, (B/c Bur. 1973), review denied, 42 FCC 2d 764 (1973), recon. denied, 46 FCC 2d 385, 386 (1974).

If the station does repeat the attack, it will have an obligation under the rule to offer the attacked person still another opportunity to respond.

When Licensee Has No Tape or Transcript of Attack

19. As the rule states, if a licensee has no script or tape of an attack it has broadcast, it must furnish an "accurate summary" of the attack to the person or group attacked. There is no Commission rule requiring stations to tape or retain the tapes or scripts of their programs, but in footnote 7 to the Memorandum Opinion and Order adopting the personal attack rule, the Commission stated:

> As we have stated in the notice of proposed rulemaking, where a licensee determines that a personal attack has not occurred but recognizes that there may be some dispute concerning this conclusion, he should keep available for public inspection, for a reasonable period of time, a tape, transcript, or summary of the broadcast in question. 48/

48/ Personal Attacks; Political Editorials, 8 FCC 2d 721, 726 n. 7 (1967).

G. THE FAIRNESS DOCTRINE AND POLITICAL CAMPAIGNS */

*/ Parts of this section are taken from the corresponding portions of the Commission's Primer, The Law of Political Broadcasting and Cablecasting, 69 FCC 2d 2209 (1978).

The requirements of the Fairness Doctrine in connection with political campaigns are quite different from the "equal opportunities" that must be afforded legally qualified candidates for public office under Section 315(a) of the Communications Act. First, the Fairness Doctrine deals with controversial public issues whereas the equal opportunities law deals with persons (that is, candidates). 1/ Second, although equal opportunities must be made available to competing political candidates, the Fairness Doctrine requires only that reasonable opportunities be given contrasting views on controversial issues of public importance.

1. Fairness Doctrine Does Not Apply to "Uses" of Stations by Candidates. The Fairness Doctrine does not apply to "uses" of stations by political candidates (that is, to spot announcements in which the candidate's identified or identifiable voice or picture appears, or to programs in which the candidate's appearance is an integral part of the program, and which are not exempt under Section 315(a) of the Act from the "equal opportunities"

1/ The Fairness Doctrine does deal with persons in two respects: (i) when personal attacks are broadcast and (ii) when a station broadcasts an editorial endorsing or opposing a political candidate. These two special applications of the doctrine are set forth in Section F (personal attacks) and in par. 4 of this section.

requirement). The more stringent "equal opportunities" requirement applies to "uses":

> In Section 315(a) Congress has specified that equal opportunities shall be applicable to legally qualified candidates and that in other instances "fairness" shall be applicable--that is, that there be afforded "... reasonable opportunity for the discussion of conflicting viewpoints on issues of public importance." 2/ (Emphasis added.)

2. It Does Apply to News Coverage or Other Appearances of Candidates. The Fairness Doctrine applies to appearances by candidates on programs which are not "uses" of a station, as listed in Section 315(a) of the Act. It also applies to news coverage of candidates in general. The controversial public issue in a political race is who among the competing candidates for nomination or election to an office should be chosen. The individual candidates represent "contrasting viewpoints" on the overall issue of which should be elected, rather than each candidate being a controversial issue himself or herself. Therefore under the Fairness Doctrine a broadcaster is called upon to make a reasonable, good faith judgment on the significance of a particular candidate and on this basis to decide how much coverage should be given to the candidacy and campaign activities. For example, the broadcaster is not required to give as much coverage to third party candidates as major party candidates. 3/ In one case, a third party candidate received 14 minutes in news coverage or in exempt personal appearances, compared to 40 minutes for each of the two major party candidates. The Commission found reasonable the licensee's determination that because of the third party's record in the previous election, it was not a major party. 4/

3. Appearances by Supporters of Candidates (The "Zapple Doctrine"). The Commission applies the Fairness Doctrine in a special way to one kind of political situation--that is, where Candidate A or his supporters buy time in which to support A or criticize his opponent, but A does not appear on the broadcast in person. If supporters of Candidate B then seek to buy an equal amount of time they will be entitled to do so although the Fairness Doctrine does not usually require equal amounts of time for contrasting views on an issue. Similarly, if A's supporters have obtained free time, B's supporters must be given free time if they ask for it. Although in this situation the candidates themselves would not appear and the broadcasts would not be "uses," the Commission recognizes that such broadcasts are in "the political arena" and that a "quasi-equal opportunities" situation arises to which the Fairness Doctrine should be applied in a way that has the same result as the equal opportunities requirement for appearances by candidates themselves. 5/ The Commission has stated that the so-called "Zapple Doctrine" is "a particularization of what the public interest calls for in certain political situations...." It also has explained that this policy applies only to major political parties. 6/

4. Political Editorials. The Commission's rules dealing with so-called "political editorials" and personal attacks are based on the Fairness Doctrine. The personal attack rule was discussed in Section F. Neither rule forbids the broadcast of anything. The rules do require broadcasters who carry such editorials or attacks to offer the persons adversely affected by them a reasonable chance to respond in person or through a spokesperson. The political editorializing rule follows:

> Section 73.1930 Political editorials.
>
> (a) Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to, respectively, (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial, (A) notification of the date and the time of the editorial, (B) a script or tape of the editorial and (C) an offer of a reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities. Where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.
>
> (b) Inasmuch as noncommercial educational stations may not engage in editorializing nor may support nor oppose any candidate for political office (Section 399(a), Communications Act), the provisions of paragraph (a) of this section, do not apply to such stations. 7/

Note that candidates are not necessarily entitled to respond in person. If they did respond personally, their opponents in the campaign would be entitled to "equal opportunities" under Section 315(a) of the Act, and since the opponents could not be censored, they could use their "equal time" in any way they chose. This is why the broadcaster is given the alternative of offering time for a spokesperson of the candidate to respond. However, in adopting this rule, the Commission stated that "Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved." 8/ Examples of the Commission's interpretation of other parts of the rule follow:

2/ First Fairness Report, 36 FCC 2d 40, 47 (1972). This policy was recently affirmed by the Commission in a rule-making proceeding which also amended the personal attack rule so as to exempt attacks made during "uses" by legally qualified political candidates. Report and Order, 44 Fed. Reg. 45951, 45 RR 2d 1635 (1979); see also, Gloria Sage, 62 FCC 2d 135 (1976), review denied, 63 FCC 2d 148 (1977); and Section F above on personal attacks.

3/ Lawrence L. C. Smith, 40 FCC 349 (1963); Penny Manes, 38 FCC 2d 308 (1972), recon. denied, 42 FCC 2d 878 (1973); Robin Picker, 65 FCC 2d 657 (1977); American Independent Party and Eugene McCarthy, 62 FCC 2d 4 (1976); U.S. Labor Party, 57 FCC 2d 1273 (B/c Bur. 1976).

4/ Harvey Michelman, 38 FCC 2d 374 (1972).

5/ Nicholas Zapple, 23 FCC 2d 707 (1970).

6/ First Fairness Report, 36 FCC 2d 40, 47-50 (1972); National Libertarian Party, 37 FCC 2d 949 (B/c Bur. 1972).

7/ The corresponding rule for origination cablecasts is found in Section 76.209(d).

8/ Personal Attacks; Political Editorials, 8 FCC 2d 721, 727 (1967).

(a) What is a Station Editorial? Basically, a station editorial is a statement representing the view of the licensee of the station, such as its owner, a principal officer or the manager or another employee if he or she is permitted by the licensee to speak for the station. Even if a statement is not labeled an editorial, it may be one. For example, on the day before the primary elections the president and controlling stockholder of a station endorsed several candidates during an interview with him broadcast by his station. The station president claimed later that his statements about the candidates represented only his personal feelings and were not an editorial endorsement of candidates by the station itself. The Commission stated that "when the president and controlling stockholder of a licensee ... endorses candidates for public office, such endorsements are indistinguishable from a station editorial within the meaning of Section [73.1930]." 9/ In another case, the president of the licensee of a station who normally broadcast the station's editorials broadcast a two-minute personal endorsement of eight candidates in an upcoming election. The licensee president was identified by name during the broadcast and was readily identifiable by the audience as both the president of the licensee and the person who usually delivered its editorials. However, the two-minute broadcast was announced as sponsored by or on behalf of one or more of the candidates. The Bureau ruled that the appearance of the president of the licensee, although identified as a paid political announcement, "was in substance and effect an editorial endorsement by the licensee of the eight candidates named" and therefore was subject to the political editorializing rule. When the licensee sought review of the staff ruling, the Commission affirmed the ruling, emphasizing that its decision was limited to the facts of the particular case. 10/ In still another case, all three stations in a city broadcast an identical item in their newscasts on the day before election. The item stated that the managers of all three stations had endorsed the same candidates in the next day's election. Two of the station managers had broadcast endorsements of these same candidates at an earlier date and at that time had complied with the requirements of the editorializing rule as to notifying other candidates, etc., but the endorsement by the third manager was not announced until the "news item" was broadcast just before election day. The Commission ruled that the broadcast of the announcement of the endorsement by all three managers was in effect the broadcast of a new political editorial, and that the candidates not endorsed should have been notified in advance. 11/ On the other hand, a statement of an employee or commentator of a station is not a station editorial unless it is represented to be one. 12/

(b) "72-Hour Rule." In two of the cases cited above, the stations did not comply with the requirement that if a political editorial is broadcast within 72 hours of election day, notice must be given to the candidates opposed or not endorsed in the editorial sufficiently far in advance for them to "have a reasonable opportunity to prepare a response and to present it in a timely fashion." In still another case, the station broadcast an endorsement of one candidate on the day before the election and then telephoned the opposing candidates and offered them a chance to respond. This was a violation of the rule, since the notification was not given "in advance of the broadcast." 13/ The same ruling was made in a case where the station broadcast an endorsement of one candidate twice on the day before election and once on election day and wrote the other candidate a letter offering him a chance to respond, but the letter was not even mailed until election day. 14/

(c) "Reasonable Opportunity to Respond." There can be no single definition of what is an offer of a reasonable opportunity to respond to a political editorial, because the reasonableness of the opportunity may vary with the circumstances, as the Commission noted on p. 727 of its Order adopting the rule, cited above. The Commission stated that "In many instances, a comparable opportunity in time and scheduling will be clearly appropriate; in others, such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response." Thus, if a station's editorial stated merely that it believed that the following candidates were best qualified for election to the city council and then listed 10 persons, the entire editorial might be less than a minute long, but a "reasonable opportunity" for a response by any of the candidates who were not endorsed certainly would require more than one-tenth of the time occupied by the editorial. In a specific case, the Commission found that the station had not given a candidate a reasonable opportunity to respond when it devoted 25 lines of script to endorsing his opponent and opposing him, and offered him the equivalent of six lines for his response. 15/ The Commission ruled that reasonable opportunity had been offered in another case, where the station had broadcast a one-minute editorial opposing a candidate's election at 6:25 and 10:25 p.m. on October 28 and then offered the candidate five minutes for a response to be broadcast at 10:25 p.m. on election eve, November 5. The Commission said it could not find the offer of five minutes on election eve compared to two earlier one-minute editorials to be unreasonable. 16/ However, the frequency with which the editorial endorsement has been broadcast may be a factor in judging the reasonableness of a candidate's opportunity to respond if the candidate raises this issue. In one such case, the station broadcast 24 twenty-second editorials endorsing five candidates; then offered a competing candidate six twenty-second spots for his response.

9/ Colby Broadcasting Corporation (WJOB), 32 FCC 2d 285 (1971).

10/ Springfield Broadcasting Corp. (WWLP), 32 FCC 2d 493 (B/c Bur. 1971), review denied, 32 FCC 2d 493 (1971); see also, Port Jervis Broadcasting Co. (forfeiture order), June 24, 1976, (B/c Bur.), application for mitigation or remission denied, 67 FCC 2d 169 (B/c Bur. 1977); Adam Hartinco, 28 FCC 2d 391 (B/c Bur. 1971).

11/ KSLY, KATY, KVEC (Notice of Apparent Liability for Forfeiture), May 31, 1973, FCC 73-594.

12/ Accuracy in Media, 45 FCC 2d 297 (B/c Bur. 1973); Edward L. Fanning, 57 FCC 2d 604 (B/c Bur. 1975).

13/ Vernon L. Hammed (WKIK), 43 FCC 2d 593 (B/c Bur. 1973).

14/ Black River Radio, 28 FCC 2d 337 (B/c Bur. 1971).

15/ Dolph Pattey Broadcasting Co. (KUDE), 30 FCC 2d 675 (1971).

16/ William J. Dodd (KATC-TV), 32 FCC 2d 545 (B/c Bur. 1971).

17/ George E. Cooley (KING), 10 FCC 2d 970 (1967).

The candidate objected on the grounds that the messages endorsing his opponents had been given much greater broadcast frequency. He did not object to the total amount of time offered to him. The FCC ruled that the station's offer of six 20-second spots compared to its own 24 20-second editorials (a 4-to-1 ratio) was not reasonable. It stated that "in making a judgment as to what constitutes a reasonable opportunity for response, the station must give consideration both the the amount of time directed to each candidate and to the frequency of the announcements (which involve the factors of effective repetition and the reaching of possibly different audiences)." It said the licensee had not shown that a counter-offer of a 10-second announcement giving the candidate 12 opportunities to reach the audience was not feasible. 17/

(d) When Does an Editorial Endorse or Oppose a Candidate? If an editorial simply urges the election of one candidate to a certain office or recommends that the public vote against another candidate, there is no question as to whether the editorial falls within the scope of the rule. However, all cases have not been this clear, as illustrated by the following three:

(1) Two of the five members of the Board of Town Commissioners were running for reelection. Without identifying any candidate by name, a station broadcast editorials criticizing the current Board and urging the public to vote for "a change." The Commission ruled that even though the two Board members seeking reelection were not named, the editorial was in effect a statement of the station licensee's opposition to their candidacies and therefore was a political editorial under the rules. 18/

18/ Bel Air Broadcasting Co., Inc., 47 FCC 2d 985 (1974).

(2) During the second week before an election, station editorials referred to the fact that a State Senator announced that he would introduce legislation to create a commission to investigate corruption in government. Without referring to the election or the fact that the State Senator was a candidate for reelection, the editorial praised the idea of creating such a commission. The Senator's campaign workers distributed a campaign flier on which the editorial was printed, along with the station's logotype. The station broadcast a disclaimer of the flier three times, stating that use of its logo was unauthorized and that the station had a policy of not endorsing individual candidates. It also wrote to the Senator demanding that he stop using its trademark. The Senator's opponent claimed that the need for strengthened ethics legislation for state officials was a principal issue in his campaign, and that the station's editorial was interpreted by some persons as an endorsement of the Senator. The station denied that the editorial endorsed him or even inferentially advocated his election. The Commission ruled that although the favorable reference to the Senator's proposal "could arguably and with some logic be viewed as an endorsement ... to apply our political editorializing rules in these situations--where no clear-cut endorsement of a candidacy is involved, would make little practical or legal sense.... [I]nstead of encouraging 'uninhibited, robust and wide-open debate' ... the effect of our ruling would be to inhibit it." 19/

19/ Stephen M. Slavin, 45 FCC 2d 639, 641-42 (1973).

(3) A county prosecuting attorney was a candidate for Democratic nomination for governor. The day before the primary, a station broadcast an editorial six times, strongly criticizing the candidate's record as a prosecutor but making no mention of the primary election for governor or the fact that he was a candidate in it. The licensee of the station denied that the editorial was one opposing the prosecutor's candidacy for governor. The station acknowledged, however, that the prosecutor's record was a controversial issue with "political implications" and that the broadcaster had been aware of the "political significance of the editorial." The Commission ruled that the editorial was a political one opposing the prosecutor's candidacy for governor, because the station took "a partisan position on a politically significant issue which is readily and clearly identified with a legally qualified candidate." The editorial "inferentially ... challenged the qualifications of this official to obtain nomination as his party's Gubernational candidate." Also, "The editorial was broadcast on election eve, even though ... the issue was one of public concern long before...." 20/ (The Commission found a difference between this and the Stephen M. Slavin case above in that the editorial in this case dealt with the candidate's "capacity to function as a public official," whereas in the Slavin case "it was the need for legislation to control government corruption that the station sought to endorse, not the candidacy of Senator Berning per se." The Commission noted, as another distinction, the fact in the Slavin case the station had broadcast denials that an endorsement had been intended, p. 132.)

20/ Taft Broadcasting Co., 53 FCC 2d 126, 132, 133 (1975).

(e) Only Candidates or Spokespersons Have Right to Reply. A station endorsed one candidate for mayor. An organization apparently not connected with any candidate sought time to reply to the editorial. The Bureau ruled that under the political editorializing rule "no persons other than candidates or spokesmen for candidates have a right to reply to station [political] editorials, and therefore a licensee has fulfilled its obligations under the applicable rule when it notifies the appropriate candidate." 21/ The FCC added that the general Fairness Doctrine is applicable to coverage of political campaigns but that, aside from the specialized political editorial situation, it does not require that time be made available to any particular person or group.

21/ Joe I. Epstein (WCAU), 32 FCC 2d 122 (B/C Bur. 1971).

(f) Introducing the Candidate's Reply. A station endorsed one mayoral candidate and offered each of his five opponents an opportunity to reply through a spokesperson. One of the opponents objected to the manner in which the reply was to be introduced by the station:

> WCBS-TV has endorsed the candidacy of John Lindsay for Mayor of New York. Replying on behalf of _____, the candidate for mayor, here is _____.

The station asserted that this form of introduction was desirable to enable the audience to place replies to editorials in perspective and that the Commission should not substitute its judgment for that of the good faith, reasonable judgment of the licensee as to the wording of the introduction. The Commission stated that it was not denying the licensee the right to use the introduction, but that use of such an introduction would create an additional fairness obligation. The Commission explained its ruling in the following passage:

> In the field of political editorializing, the licensee is under an obligation to adhere scrupulously to the requirements of fairness. See Complaint of Clarence F. Massart, 10 FCC 2d 968 (1967); Complaint of George K. Cooley, 10 FCC 2d 970 (1967). We recognize that the responses to the editorial must be introduced, so as to give the listeners some background of the presentation of the response. In many instances, the introduction described by WCBS-TV raises no additional fairness problems, as where the response specifically addresses itself to the prior editorial. The response, however, may also go to the merits of the matter, but without any reference to the prior editorial. This may be a deliberate strategy of the candidate, on the theory that it hurts his cause to have been opposed by the broadcast station, and therefore, while he wishes to respond on the merits, he does not wish to give added publicity to the station opposition to him or endorsement of his rival. Crucial to our consideration of this issue is the fact that many political editorials (and also those in print media) consist of virtually the CBS introductory material--namely, that "Station _____ endorses the candidacy of _____ for the office of _____." That was, in essence, the nature of the editorials in the above cited Massart and Cooley cases. It follows, in view of this consideration in the political editorializing field, that when the licensee introduces the response with material such as involved here, it is, in effect, again engaging in a further endorsement and doing so against the express desires of the rival candidate who has reasonably decided on a different strategy in meeting the challenge of the editorial endorsement.
>
> We would also note that there are alternatives which the licensee can pursue, so as to set the stage for the presentation of the response. Just as one example of such alternatives, the choice of which is for the licensee, a licensee can simply say that it is presenting "_____ on behalf of _____ to reply to a previous editorial of this station in the election campaign."
>
> We wish to stress that just as we believe it appropriate to promote editorializing, including on political issues by broadcast licensees, so also--for the same reason, namely, to have robust, wide-open debate--we seek to facilitate the response. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). We believe that many candidates will be reluctant to avail themselves of the opportunity for response, embodied in our rules, if it means that by so doing, the editorial endorsement or opposition of the station is automatically disseminated again to a new audience.

In sum, we do not hold that the introduction in question imposes any further fairness obligation when the responsible candidate either does not object or indeed is going to challenge the editorial by specific mention thereof. We do hold that where the candidate chooses a different route such as Mr. Procaccino has done, the licensee is then under an additional fairness obligation when it chooses to repeat the endorsement or opposition in introducing the response. Finally, our holding is restricted to the facts of the case, and particularly to the political broadcast field where the short announcement of endorsement is so frequently encountered. 22/

22/ Mario Procaccino (WCBS-TV), 20 FCC 2d 451, 452 (1969).

5. Sale of Time to Political Parties. In the BEM case cited in Section B, above, the Commission was upheld by the U.S. Supreme Court in refusing to require stations to sell time for the discussion of controversial public issues. 23/ In another case, the Commission upheld the general proposition enunciated in BEM by refusing a request of the Democratic National Committee (DNC) for a declaratory ruling that broadcasters may not, as a general policy, refuse to sell time to "responsible entities, such as DNC ... for comment on public issues." However, in that case, the Commission granted another part of the DNC's request: that it rule that broadcasters may not, as a general policy, arbitrarily refuse to sell time to major political parties for the solicitation of funds. The Commission stated that Congress had singled out political broadcasts as a particularly important aspect of the licensee's public interest obligation, that political parties are an integral part of our democratic process, and that it serves the public interest to promote the widest possible support by citizens of the party of their choice. It concluded that broadcasters could not "adopt or follow arbitrary policies with respect to the sale of broadcast time to significant political parties for the solicitation of funds." It stated that "affording time for such solicitation does not raise any offsetting considerations, because of the combined force of a number of factors: (i) This area can be appropriately singled out, since Congress has singled it out for special attention by broadcast licensees; (ii) This would appear particularly to be an area where the relatively short announcement, limited very largely to fund solicitations, is both effective and appropriate; (iii) There is no problem under Cullman ...." 24/ (See Part I, Section B and Part III, Section D, par. 11(a) re Cullman doctrine.)

23/ FCC v. Business Executives' Move for Vietnam Peace, 412 U.S. 94 (1973).

H. MISCELLANEOUS RULES AND POLICIES

Although this section of Part III does not deal with the Fairness Doctrine itself, it deals with certain Commission rules and policies which sometimes are involved collaterally in Fairness Doctrine cases and therefore may be of interest to readers of this Primer.

1. Sponsorship Identification. When a station is paid to broadcast anything, it must announce that the broadcast is paid for and who paid for it. 1/ The announcement must be made at the time the material is broadcast. Although the sponsorship identification statute uses the term "paid for," the FCC considers "sponsored" to have the same meaning. 2/ However, some other terms have been ruled inadequate to inform the public that payment has been made. For example, the term "presented by" does not serve this purpose, because it often is used in introducing unsponsored programs merely to indicate what organization produced or was responsible for the presentation of the program; for example, a non-profit civic, educational or religious organization. Since terms like "presented by" are used for many unsponsored programs, they are not adequate substitutes for "paid for" or "sponsored" when programs are sponsored. In one case the Commission ruled the following was not sufficient sponsorship identification for a program paid for by the Minnesota School Boards Association: 3/

24/ Democratic National Committee, 25 FCC 2d 216, 230 (1970).

1/ Section 317(a)(1) Communications Act of 1934, as amended (47 U.S.C. § 317).

2/ Section 73.1212(a)(1).

> This is Jack Douglas speaking for the Minnesota School Boards Association ....

3/ Midwest Radio-Television, Inc. (WCCO), 49 FCC 2d 512 (1974); see, also, Lamar A. Newcomb (WFAX), 1 FCC 2d 1395 (1965); United Broadcasting Co. of New York, Inc., 45 FCC 1921 (1965).

2. Program Material Furnished Free. Even when no time has been bought in which to present a program, if the program deals with a political or controversial public issue and if films, records, scripts, performers or other services have been furnished free to the station in order to induce it to broadcast the material, an announcement must be made that the material or service has been furnished to the station. The exact language of the rule on this subject follows: 4/

> In the case of any political broadcast matter or any broadcast matter involving the discussion of a controversial issue of public importance for which any film, record, transcription, talent, script, or other material or service of any kind is furnished, either directly or indirectly, to a station as an inducement for broadcasting such matter, an announcement shall be made both at the beginning and conclusion of such broadcast on which such material or service is used that such film, record, transcription, talent, script, or other material or service has been furnished to such station in connection with the transmission of such broadcast matter: Provided, however, That in the case of any broadcast of 5 minutes' duration or less, only one such announcement need be made either at the beginning or conclusion of the broadcast.

4/ Section 73.1212(d) for broadcast stations; Section 76.221(c) for origination cablecasts is substantially the same.

The purpose here, as in the requirement for sponsorship identification, is to let the public know "by whom it is being persuaded." The legislative history of the laws in this area shows that Congress did not mean to apply the requirement set forth in Section 73.1212(d) to mere mimeographed or printed press releases, as contrasted to films, recordings, performers or complete scripts. However, the rule does mean that when a Congressperson furnishes stations with taped or filmed reports to his or her constituents, the taped or filmed material must be identified as furnished by the Congressperson. Since the word "service" also is included in the rule, it covers not only previously prepared taped or filmed statements on political or controversial issues but also situations in which an official or a political committee makes available to a station a camera or sound recording crew so that a representative of the station can conduct an interview on a political matter or controversial public issues. 3/ Another situation in which the announcement is required because a "service" is furnished is that in which public officials or others retain their taped statements in their own offices but set up telephone playback systems whereby a broadcaster dialing a certain number can receive by telephone the pre-recorded statement for simultaneous or delayed broadcast.

3/ Cary M. Sukow, 36 FCC 2d 668 (B/c Bur. 1972).

3. List of Officers of Sponsoring Organizations. In addition to announcing that sponsored programming is sponsored or that political or controversial matter has been furnished free, the broadcaster must comply with the following requirement:

> ... Where the material broadcast is a political matter or matter involving the discussion of a controversial issue of public importance and a corporation, committee, association or other unincorporated group, or other entity is paying for or furnishing the broadcast matter, the station shall, in addition to making the announcement required by this section, require that a list of the chief executive officers or members of the executive committee or of the board of directors of the corporation, committee, association or other unincorporated group, or other entity shall be made available for public inspection.... 4/

4/ Section 73.1212(e) for broadcast stations and Section 76.221(d) for cable systems.

4. Alleged Bias or Distortion in News Reporting. Fairness doctrine complaints sometimes contain allegations that a station has slanted or distorted its news reports on the subject in question. As the Commission stated in its Letter to Mrs. J. R. Paul, it considers deliberate falsification or slanting of the news to be "a most heinous act against the public interest" and it will take action when it receives extrinsic evidence of such actions, "for example, testimony, in writing or otherwise, from 'insiders' or persons who have direct personal knowledge of an intentional attempt to falsify the news," especially if the extrinsic evidence reveals orders to falsify the news from the licensee, its top management, or its news management. 7/ However, in the same letter the FCC stated:

7/ Mrs. J. R. Paul, 26 FCC 2d 591, 592 (1969); see, also, ABC, CBS, NBC (Democratic National Convention), 16 FCC 2d 650 (1969); "Pot Party" (WBBM-TV), 18 FCC 2d 124 (1969); "Hunger in America" (CBS), 20 FCC 2d 143 (1969).

> In the absence of such extrinsic evidence, the Commission has stressed ... that it cannot properly intervene. For example, the complaint is frequently received that "Commentator X has given a biased account or analysis of a news event" or that the true facts of the news event are different from those presented.... [I]n a democracy, dependent upon the fundamental rights of free speech and press, no Government agency can authenticate the news, or should try to do so. Such an attempt would cast the chill of omnipresent government censorship over the newsmen's independence in news judgment. Were this the case a newsman might decide to "play it safe," and not broadcast a valuable news story or documentary for fear he might later be held up to censure. This Commission is thus not the national arbiter of the "truth" of a news event. It cannot properly investigate to determine whether an account or analysis of a news commentator is "biased" or "true."
>
> Indeed, the drafters of the First Amendment to our constitution knew that the way to preserve truth was not through government surveillance or censorship (for that government may also be wrong), but by giving all persons with views the freedom to express them. From this "marketplace of ideas," they believed, the truth would ultimately emerge--for every citizen would have the freedom to judge the truth of a thought or idea for himself. Therefore, the policy of the First Amendment to foster "robust, wide-open debate," The New York Times Co. v. Sullivan, 376 U.S. 254 (1964), certainly permits the analysis of any one spokesman to be one-sided. What is required, under the Fairness Doctrine, is not that he be censored, but that the other side be given the opportunity to present its viewpoint.

Adopted:

FEDERAL COMMUNICATIONS COMMISSION,

William J. Tricarico
Secretary

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